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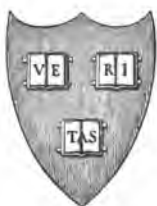
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LAWRANCE'S
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BEING
DECISIONS OF THE HIGH COURT AT
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HIGH COURT:

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GASPER GREGORY, INNER TEMPLE.

RAJENDRA MISSRY, PLEADER OF THE HIGH COURT.

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JUDGES OF THE HIGH COURT.

HON'BLE SIR RICHARD COUCH, *Knight, Chief Justice.*

„ F. B. KEMP,

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Puisne Judges.

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BENGAL LAW REPORTS.

APPELLATE CIVIL.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Jackson, and
Mr. Justice Mitter.*

A. B. MACKINTOSH (PLAINTIFF) v. KALLY DOSS MULLICK
AND OTHERS (DEPENDANTS).*

1873
March 3 & 4

*Act X of 1859, ss. 47, 56, and 58—Suit for Rent—Service of Summons on
Defendant resident in another District—Irregularity—Benami—Act VIII
of 1859, s. 119.*

In a suit for rent under Act X of 1859, service of summons on a defendant, whose abode is in another district, by a peon from the Court of the Collector of the district in which the suit is brought, instead of through the Collector of the district in which the defendant resides, as required by s. 47 of the Act, is not such an irregularity as vitiates the whole proceedings and renders the decree and a sale in execution thereof void.

Per JACKSON, J.—The words in s. 56 “upon proof that the summons or proclamation has been duly served according to the provisions of this Act” refer to the mode in which a summons is to be served, and not to the agency by which it is to be served.

THIS was a suit by a mortgagor to recover possession of the mortgaged premises which were situated in Dehi Panchannogram, in the district of the 24-Pergunnahs and for mesne profits.

In February 1868 a suit was instituted by the Government in the Court of the Collector of the 24-Pergunnahs against

* Regular Appeal, No. 246 of 1871, from a decree of the second Subordinate Judge of the 24-Pergunnahs, dated the 31st July 1871.

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Ashootosh Deb and Promothonath Deb, the recorded tenants of the property in dispute. But on discovery that these persons were dead, and that Nobinmoney Dossee, Charoo Chunder Ghose, and Surruth Chunder Ghose, the second, third, and fourth defendants in the present suit, had accepted the summons and granted receipts as their heirs, the last named persons were substituted as defendants, and a summons was issued requiring them to appear. This summons was served by a peon from the Court of the Collector of the 24-Pergunnahs, by affixing a copy to the outer door of the defendants' house in Calcutta, and another copy in the Collector's office, it being stated that the defendants could not be found on search being made. The defendants at the time of service were living in Calcutta. None of the defendants appeared, and an *ex parte* decree was passed against them, in execution of which the property was put up for sale and purchased on the 14th August 1868 by Nobin Chunder Bose, one of the defendants in the present suit, for Rs. 240. The latter, in April 1869, mortgaged it to one Nilkant Holdar, and on the 28th April 1870, in order to redeem the mortgage and meet other liabilities, he conveyed it to the defendant Kally Doss Mullick, for Rs. 2,400.

The property had been mortgaged by the owners to the plaintiff in 1863, and on the 14th April 1870, he had obtained a decree for foreclosure. He alleged in his plaint that, on endeavoring to obtain possession under this decree, he was opposed by the defendant Nobin Chunder Bose, the purchaser at the sale in execution of the decree for rent, who, he stated, was a mere benamidar of the mortgagors. He submitted that the rent suit was irregular and collusive, and that the decree therein and sale in execution were therefore invalid; and he prayed that the sale might be set aside, and that possession and mesne profits might be decreed to him.

Written statements were filed by Nobin Chunder Bose, Kally Doss Mullick, and the Collector of the 24-Pergunnahs, who had been joined as a defendant by the plaintiff.

The Subordinate Judge dismissed the plaintiff's suit, holding *inter alia* that there was no such irregularity in the proceedings in the rent suit as would invalidate the decree, and that the

evidence as to the benami nature of Nobin Chunder Bose's purchase was insufficient.

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The plaintiff appealed to the High Court.

The *Offg. Advocate-General* (Mr. Paul) (with him Baboo Ambica Churn Ghose) for the appellant.

Baboos Gopal Lall Mitter and Nilmadhub Bose for the respondents

The *Advocate-General*.—The rent suit was altogether informal; there having been no service of summons according to law, and consequently no jurisdiction in the Judge to pass any decree whatever. The receipt for the first summons was given by persons who, at the time, were perfect strangers to the suit, and it could not, therefore, amount to acceptance of service. Act X of 1859, s. 47, provides that, where the defendant's abode is in another district, the summons shall be served through the Collector of such district. [Couch, C.J.—The summons was served, though not in the regular manner.] The proceeding was unwarranted, and therefore a nullity, and not a mere irregularity—2 Chitty's Archbold 6, 1471. The Act must be strictly complied with, or the decree be set aside; see *Maharaja Mahashur Sing Bahadur v. Baboo Hurruck Narain Singh* (1). The decree was a nullity, and the sale thereunder wholly invalid.

Baboo Gopal Lall Mitter for the respondents.—There is no appeal from a judgment passed *ex parte* against a defendant for non-appearance—Act X of 1859, s. 58. [Couch, C.J.—That is where the defendant has been duly served according to the provisions of the Act, see s. 56.] There has been no failure of service, the mode of service may not have been regular, but the mortgagors were made aware of the suit, which is the whole object of service.

The *Advocate-General* in reply.

The following were the judgments of the Court:—

COUCH, C.J.—The case put forward in the plaint in this suit was that Nobin Chunder Bose had made a purchase as the

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benamidar for the second, third and fourth defendants ; that the sixth defendant had subsequently made a collusive purchase from Nobin Chunder Bose ; that the sale at which the property in suit was purchased was in execution of a decree passed in a previous suit ; that as the suit was irregular and collusive, the decree passed therein, and the sale in pursuance of it, were invalid and the plaintiff prayed that the illegal and collusive sale, as he called it, should be set aside.

There was no pretence for alleging that there was any collusion on the part of the Collector, nor has it been shown that Charoo Chunder brought about the sale by any intentional default in paying the rent due to the Government. In fact, the case as presented to us now is that Nobin Chunder Bose purchased on behalf of Charoo Chunder and Surruth Chunder, and it was simply a case of benami transaction.

An objection has been taken to the validity of the sale that the defendants in the suit brought by the Government were not summoned. It was put as high as that by the learned Advocate-General. This objection, although not distinctly raised in the plaint, may be considered as coming under the allegation that the suit was irregular.

It appears that the suit being commenced by the Government through Prosonno Coomar Mookerjee, the head mohurir, Ashootosh Deb and Promothonath Deb were made defendants in the plaint. Then it was discovered that they were dead, and the second, third and fourth defendants accepted the summons and granted receipts as the heirs. A summons was issued, entitled " in the suit of Prosonno Coomar Mookerjee, head mohurir, on part of Government " as plaintiff, and these persons as defendants, requiring them to appear on the 9th of April 1868. This summons appears, from the receipt of the peon, which is annexed to it, to have been served by being affixed to the outer door of the house of the defendants, it being stated that on search they were not to be found. Now s. 45 of Act X of 1859 provides that " the summons shall be served by delivering a copy of the summons to the defendant personally when practicable, or if the summons cannot be served on the defendant personally, by affixing a copy of it to some conspicuous part of

his usual place of abode, and also affixing a copy of the same in the Collector's office." S. 47 provides that, if the "place of abode of the defendant be in another district, the summons, together with the costs of the service thereof, shall be sent, by the public post, to the Collector of such district, who shall issue the summons and return the same after service, with the prescribed endorsement to the officer by whom it was transmitted to him." These defendants, it is said, were living in another district, in the district of Calcutta, the proceedings being in the Court of the Collector of the 24-Pergunnahs, and it is upon the ground that the summons was not sent, in the manner indicated, to the Collector of Calcutta, that the Advocate-General has rested his objection to the validity of the decree. It is true as argued by him that s. 56 says :—"If on the day fixed by the summons or proclamation for the appearance of the defendant the plaintiff only appears, the Collector upon proof that the summons or proclamation has been duly served, according to the provisions of this Act, shall proceed to examine the plaintiff or his agent, and after considering the allegations of the plaintiff and any documentary or oral evidence adduced by him, may pass judgment *ex parte* against the defendant ;" but it appears to me that the words as to summons or proclamation being duly served according to the provisions of the Act refer to the mode of service directed by s. 45 and it would not be a ground for not proceeding with the case that the summons was not served through the Collector of the district, but by an officer of the Court itself, if the summons had been served in the manner the Act requires, namely, personally when it is practicable, or by affixing a copy to the defendant's place of abode when personal service is not possible. S. 58 provides that an appeal shall not lie "from a judgment passed *ex parte* against a defendant who has not appeared, but that in all such cases if the defendant shall, within 15 days after any process for enforcing the judgment has been executed, or at any earlier period, show good and sufficient cause for his previous non-appearance, and satisfy the Court that there has been a failure of justice, the Collector may, upon such terms and conditions as to costs or otherwise as he may

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think proper, revive the suit and alter or rescind the decree as the justice of the case requires." In this case I think there was an *ex parte* judgment against the defendants which, if they had been prejudiced by the summons having been served on them in this manner, instead of through the Collector of Calcutta, they should have applied to have set aside. There would be really no reason for setting aside the judgment if they had notice of the proceedings. The summons having been served on them by a peon from the Court of the 24-Pergunnahs would give them notice just as well as if it had been served by a peon of the Collector of Calcutta. It seems to me there is no reason for holding that an irregularity of this kind by which the party is not injured vitiates the whole proceedings and renders the decree void, and as was contended for by the learned Advocate-General that the sale should also be treated as void and as giving no title to the purchaser. No authority going to such a length has been quoted to us. I think the decree was not rendered void by the summons not being served through the Collector of Calcutta. The appeal must be dismissed with costs.

JACKSON, J.—I am entirely of the same opinion. On the first part of the case the plaintiff asks us, sitting here in appeal, to declare that the decree obtained against Charoo Chunder and his co-defendants was a nullity, and then to go on and set aside the sale by which the land in dispute was conveyed to Nobin Chunder Bose. I entirely concur in the view taken by the Chief Justice as to the meaning of the words in s. 56, Act X of 1859, with reference to a summons being duly served according to the provisions of that Act. It seems to me that those words clearly refer to the mode in which a summons is to be served, and not to the agency by which it is to be served. If we suppose that the plaintiff, or that the defendants in the rent suit, had proceeded by way of application to the Revenue Court, to set aside the *ex parte* decree on the ground that the summons was not duly served under the provisions of the Act, can we suppose that the Revenue Court would, adverting to the terms of s. 58 have set aside its own decree? It must be borne in mind that the land in respect of which the arrear of rent was claimed is in

Dehi Panchannogram, which is a suburb of Calcutta, and that the occupants of the land lived just within the town of Calcutta, at a distance which does not precisely appear, but which certainly does not exceed two or three miles. Can we suppose that under such circumstances the Collector would have held that the summons had not been duly served according to the provisions of the Act, because the serving officer was a peon on his own establishment, and not on the establishment of a neighbouring Collector, and that in consequence failure of justice occurred, for unless he were of that opinion, he could not have granted a new trial? Then, is the plaintiff in the present case to be in a better position than the defendants in the rent suit would have been if they applied under s. 58, Act X of 1859? It appears to me that he ought not, and that there would be considerable danger in allowing him so to stand; for otherwise, instead of submitting the question as to the regularity of the rent decree obtained to the Courts which granted it, it would be leaving the matter to be tried by a different Court, and considerable facility would thus be afforded for collusion between the plaintiff and the defendant for the purpose of defeating a third party, the purchaser of the land sold. But in addition to that, it seems to me to be extremely doubtful whether the Civil Court, which includes not only the Court of the District Judge and of the Subordinate Judge, but also that of the Moonsiff, is competent to enquire in to the regularity of decrees obtained in the Revenue Court, and either set them aside, or treat them as nullities, on the ground of greater or less irregularities in the proceedings. But even if we admit that the decree ought in this case to have been set aside, and that the Civil Court might deal with it as the plaintiff asked, will the sale for that reason be annulled? As far as I am aware, all the decided cases in this Court take the clear position that under such circumstances the sale, which has been held in execution of a decree either of the Civil or the Revenue Court, does not fall simply because the decree has been afterwards set aside. I think, therefore, that this Court could not on the ground contended for by the plaintiff, even if it were made out, declare the sale to be invalid.

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I agree, therefore, in thinking that this appeal must be dismissed with costs.

MITTEE, J.—I am of the same opinion. I do not think that the mere fact of non-service of summons, according to the provisions of the Act, is sufficient to render a decree passed by a Court of competent jurisdiction an absolute nullity; for it is clear from the provisions of s. 119 of Act VIII of 1859, as well as from those of s. 58, Act X of the same year, that, unless such a decree is impeached within the time prescribed by those sections, its validity cannot be questioned afterwards. If a decree passed by a Court of competent jurisdiction were, as contended by the appellant, an absolute nullity merely because the summons had not been duly served, the Legislature would not have made those provisions for having such a decree set aside within a prescribed period of time. I have further to remark that the objection as to the validity of the decree does not affect the sale to the purchaser Nobin Chunder Bose, and in that respect the case falls within the principle laid down in the case of *Jan Ali v. Jan Ali Chowdhry* (1). In that case a suit for arrears of rent had been brought against the plaintiff, and an *ex parte* decree passed against him. While that decree was in force, the plaintiff's property was sold in execution, and purchased *bonâ fide* by one of the defendants. The decree was afterwards set aside on the application of the plaintiff under the provisions of s. 58, Act X of 1859, upon the ground that he had been kept in ignorance of the proceedings instituted against him by the fraud of the principal defendant. But, notwithstanding the reversal of the decree, the Court refused to interfere with the sale on the ground that, at the time when it was made, the decree was in full force (2).

Appeal dismissed.

(1) 1 B. L. R., 4, C. 56,

there was not sufficient evidence to establish that Nobin Chunder Bose bought

(2) Their Lordships all agreed with the Subordinate Judge in holding that

benami for the mortgagors.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Kemp.

MEECHOO CHUNDER SARCAR AND OTHERS (PLAINTIFF) v. J. H. RAVENSHAW, MAGISTRATE OF DINAGPORE (DEFENDANT).*

1873
April 18.

Removal of a House by Order of Magistrate—Suit for Possession and for Damages—Jurisdiction of Civil Court—Criminal Procedure Code (Act XXV of 1861 and Act VIII of 1869), ss. 308, 310, & 311—Act VIII of 1859, s. 1.

A Magistrate issued an order under s. 308 of Act VIII of 1869 calling upon A. to remove his hut as being an obstruction to a public highway. A. claimed a jury under s. 310, the majority of whom found that the Magistrate's order was reasonable and proper. A. refused to obey the order, and his hut was removed under s. 311. A. sued the Magistrate for possession of the land and for damages, *held* that such suit would not lie (1).

THIS suit arose out of certain proceedings taken by the defendant, the Magistrate of Dinagpore. It appeared that the plaintiffs had erected a house in such a manner as in the Magistrate's opinion amounted to an obstruction to a public highway, and under s. 308 of Act VIII of 1869, the Magistrate, on the 15th September 1870, ordered the plaintiffs to remove the same, or to show cause against the order within a certain time. Upon the plaintiffs' request, a jury was appointed under s. 310, the majority of whom found that the Magistrate's order was a reasonable and proper one. In consequence of the plaintiffs failing to obey the order, the house was, on the 29th November 1870, broken down and removed, and the plaintiffs thereupon brought the present suit against the Magistrate, alleging that the house had been used by them for a long time as a shop, that it was no obstruction to the public road, and that consequently the Magistrate had no power to pass the order of the 15th September 1870; and they prayed for possession of the land and the price of the house broken down.

* Special Appeal, No. 1012 of 1872, from a decree of the Subordinate Judge of Dinagpore, dated the 28th March 1872, reversing a decree of the Munsif of that district, dated the 20th September 1871.

(1) See *Lalji Ukheda Jowba Dowha*, 8 Bom. H. C. Rep., A. C., 24; and Act X of 1872, s. 521.

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reversing the question of damages arising from the business of the shop being stopped for a separate action. The Munsif held that the present suit was not brought either directly or indirectly for the purpose of setting aside the order of the Magistrate, nor could that order be set aside; and that, inasmuch as the Government had undertaken to defend the suit, the Magistrate, ought to be released from all liability. He gave a decree against Government for possession of the lands sued for, and also for the price of the earth taken away. From this decision both parties appealed. The lower Appellate Court dismissed the plaintiffs' appeal and decreed the appeal preferred on behalf of Government, holding that the plaintiffs were indirectly trying to set aside the order of the Magistrate, and that such order could not be set aside by a Civil Court. Against this decree the plaintiffs preferred a special appeal.

Baboo Romeshchunder Mitter and Rajender Nath Bose for the appellants.

The Legal Remembrancer (Mr. Bell) and the Senior Government Pleader (Baboo Unnoda Persaud Banerjee for the respondent.

Baboo Romeshchunder Mitter.—We sue for possession of the land on which this house was built. [Couch, C.J.—But this land is a piece of a public road, so it was found by the majority of the jury; surely a suit against a Magistrate for possession of a piece of a public road is novel.] Possession being taken away by the order of the Magistrate, we are entitled to recover possession from him. Some of the jury were of opinion that the road did not extend up to the house. The concluding clause of s. 311 of Act VIII of 1869, though it prevents the Civil Courts from entertaining a suit to restrain a Magistrate from carrying out an order made under s. 308, or a suit for damages against the Magistrate, does not bar a person against whom such order has been carried into effect from instituting a suit to prove that land declared by the Magistrate to be public is his private property—*Lalji Ukheda v. Jowba Dowba* (1).

(1) 8 Bom. H. C. Rep., A. C., 94.

[COUCH, C.J.—But in that case the Collector did not sell a piece of the public road.] The land was sold as being waste, and the wood-work erected on it removed as being an obstruction. The other side will rely on *Ujalamayi Dasi v. Chandra Kumar Neogi* (1), but that case only decides that a suit to restrain a Magistrate from carrying his order into effect will not lie; it does not say that a suit brought after such order has been carried into effect would not lie; on this ground that case was distinguished in *Lalji Ukheda v. Jowba Dowba* (2). [COUCH, C.J.—I must prefer the decision of the Full Bench of this Court. I cannot see why a suit does not lie to restrain a party from doing an act, yet for the performance of which he would be afterwards liable to an action.] The plaintiffs allege that this land is their private property; whether it is or not is the question to be tried in the suit which is one of a civil nature, and under s. 1 of Act VIII of 1859, I am entitled to a decision of a Civil Court on it unless the cognizance of such suit is taken away by express enactment.

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The *Legal Remembrancer*.—A party dissatisfied with an order passed by the Magistrate under s. 308 of Act VIII of 1869 has his remedy under s. 310 of the same Act. Where a special remedy is given, the general remedy is thereby taken away—*Collector of Patna v. Romanath Tagore* (3), *Sakharam. Shridhar Gadkari v. The Chairman of the Municipality of Kalyan* (4), and *Queen v. Dean and Chapter of Rochester* (5) S. 308 of Act XXV of 1861 is a reenactment of Act XXI of 1841, and under the old law no suit, such as the present, would lie—*Sohn. Patuok v. Omoola Koowur* (6), *Prankishen Surma v. Ramrooder Surma* (7), and *Ramkishore Bhattacharjee v. Bissahur Bhattacharjee* (8), see also *Government v. Brijsoondres Dassas* (9). The reason for taking away the jurisdiction in such cases from the Civil Courts, and giving it to the Magistrate, is stated in *Baroda Prasad Mostaffi v. Gorachand*

(1) 4 B. L. R., F. B., 24.

(5) 20 L. J., Q. B., 467.

(2) 8 Bom. H. C. Rep., A. C., 94.

(6) Marsh., 7.

(3) Case No. 3354; of 1864; 25th February 1867.

(7) *Id.*, 214.(8) *Id.*, 231.

(4) 7 Bom. H. C. Rep., A. C., 33.

(9) S. D. A., 1848, 436.

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Mostafi (1). The case of *Ujalamayi Dasi v. Chandra Kumar Neogi* (2) is directly in point. If such an action as the present was to succeed, there would be no end to the legal proceedings in such cases—*Madhab Chandra Guho v. Kamalakant Chuckerbutty* (3).

The *Legal Remembrancer* was stopped by the Court.

Baboo *Romeschunder Mitter* did not reply.

The judgment of the Court was delivered by

COUCH, C.J.—In this case it appears that the Magistrate, considering there was an unlawful obstruction or nuisance on a public thoroughfare by the buildings which are called in this suit the plaintiffs' mud kothi, made an order under s. 808 of the Code of Criminal Procedure. The plaintiffs dissatisfied with the order availed themselves of the power given to them by s. 310, and applied to have it tried by a jury whether the order of the Magistrate was a right and proper one. A jury was appointed, and their finding was that the order was reasonable and proper. They also found that this building of the plaintiffs was an obstruction to the public thoroughfare. The present suit is brought against the Magistrate, the plaintiffs complaining that by his order the building had been demolished, and the earth had been taken away for the purpose of repairing the adjacent public road, and claiming 200 rupees for the value of the materials of the building, and asking for the recovery of the land, as to which the suit is valued at 800 rupees. Now s. 311 says, that "no suit or action shall be entertained in any Court in respect of anything necessarily or reasonably done to give effect to the order" of the Magistrate after the finding of the jury, where there is a jury; and where no jury is applied for, after the passing of such order. In regard to the damages claimed for the demolition of the building, they are clearly claimed for something which was necessarily and reasonably done to give effect to the order for removing the obstruction.

(1) 3 B. L. R., A. C., 295.

(3) 6 B. L. R., 643

(2) 4 B. L. R., F. B., 24.

It is plainly within the terms of s. 311, and no action can be brought for it. Then, in regard to the part of the claim which is for the recovery of the land, although it is put in that shape, it is in reality an action against the Magistrate on account of the plaintiffs having been dispossessed of what they say is their land in carrying out this order. If there is any cause of action against the Magistrate, it is that he has dispossessed the plaintiffs of their land, and he has only done so in giving effect to an order made under s. 308 of the Code of Criminal Procedure. State the nature of the plaintiffs claim in any way you may, it comes within that section. There is another objection to the plaintiffs being allowed to sue for the recovery of the land; they say, in fact, the land is our private property; there is no public road or way over it, and it is no part of a thoroughfare, and so we claim to have possession of it given to us. But the question as to whether it is part of a public thoroughfare has been tried in the manner which the law has provided in the Code of Criminal Procedure, namely, by a jury, and it has been found against them. I say nothing as to the propriety of that decision (probably it is a very right and proper one), as we have nothing to do with that now. The plaintiffs have had what the law gives them, the right to have the question determined by a jury partly selected by themselves, and a majority of the jury has found against them. They are not at liberty to bring a suit in the Civil Court to have the question tried again, and in fact to have the order of the Magistrate under s. 308, and the finding of the jury, reversed, and the whole matter reopened. The consequence of that, as pointed out by the Legal Remembrancer, would be that there might be another order by the Magistrate, another jury appointed, another similar finding, and then another suit, and so on. The law does not allow that.

There are no grounds therefore for this appeal, which must be dismissed with costs.

Appeal dismissed.

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APPELLATE CRIMINAL.

1873
April 29 &
30.

Before Mr. Justice Phear and Mr. Justice Glover.

THE QUEEN v. KOONJO LETH AND OTHERS.*

See also *Verdict of Jury set aside—Acquittal - Criminal Procedure Code (Act X of 1872). ss. 263, 271, 287, and 288.*
12 B L R 253.

On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. Held that the High Court had power to set aside the verdict of the jury, and to direct an acquittal.

S. 263 of the Criminal Procedure Code (Act X of 1872) explained.

In this case the prisoners were found guilty by a jury of the offence of dacoity, and some of them, of having stolen property in their possession, knowing it to be stolen. The Judge who tried the case disagreed with the verdict, and accordingly, under s. 263 of the Criminal Procedure Code (X of 1872), submitted the case to the High Court.

Mr. Ghose (with him Baboo Lukhy Churn Bose) for the prisoners contended that, when a case has been referred by a Judge under s. 263 of the Criminal Procedure Code, the High Court can set aside the verdict of a jury, and direct an acquittal. The section is entirely novel. The disagreement referred to in s. 263 must be disagreement on fact; the Judge can settle any question of law, the jury are concerned with the facts only. An appeal by a prisoner under s. 271, from a verdict of the jury, must be on a question of law, but in that section there is no reference to a disagreement between the Judge and jury, therefore the "appeal" mentioned in s. 263 is to be taken in a wider sense, and the case submitted is to be treated as an appeal on a question of fact, as well as of law. [GLOVER, J. —But what is the meaning of the words in s. 263, "but it

* Reference to the High Court under s. 263 of the Criminal Procedure Code (Act X of 1872) by the Officiating Sessions Judge of Moorshedabad in his letter No. 68, dated the 29th March 1873.

may convict the accused person on the facts?"] That is, the High Court may even go so far as to convict a person who has been acquitted by a jury, for it could not have been the desire of the Legislature to procure convictions solely : a remedy for the perverse verdicts of juries is intended, and the High Court can reverse such verdicts whether of acquittal or conviction. The innocent are to be protected, as well as the guilty punished, but no doubt the words might have been more explicit. [PHEAR, J. —On a case being referred under s. 287, the High Court can acquit under s. 288, whereas, if the prisoner appealed under s. 271, the High Court cannot do so ; so if a man has been sentenced to transportation for life, the High Court cannot interfere with the findings of fact of the jury, whereas, if he is sentenced to be hanged, it can.] The whole of s. 263 must be read together ; " but it may convict, &c.," may be in opposition to the judgment of the Sessions Judge. At any rate this Court is not bound to convict, there has been no conviction, as no judgment was passed, and the High Court may agree with the Judge below and order the discharge of the prisoners, or pass whatever sentence it may consider proper.

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Cur. adv. vult.

PHEAR, J. (after shortly stating the facts).—Upon considering the evidence, we find that the prisoners have been recognized by some of the witnesses who have given their testimony ; that certain articles said to have been found in the possession of the prisoners have been identified also by some of the witnesses as articles which had been stolen from the prosecutor in the course of the dacoity ; and there is further a confession made before the Magistrate by Koonjo Leth, one of the prisoners jointly tried with the others, and in this confession, every one of the other prisoners, as well as Koonjo Leth himself, are mentioned as taking part in the dacoity. If there were nothing on the record serving to impeach these several heads of evidence, no doubt the case against the prisoners would be very strong indeed. The Judge, however, has given reasons for thinking that the recognition of the prisoners

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by the witnesses cannot be depended upon ; that the identification of stolen articles is untrustworthy : and that the confession of Koonjo Leth is not a true and real confession, but a confession which has been obtained by some 'contrivance of the Police, or in such a way at any rate as serves to render it altogether untrustworthy. We concur with the Judge in this view. Indeed, I may say for myself that, if I had to Judge of the facts merely by the testimony of the prosecutor and the other witnesses who have been called on the side of the prosecution, I should almost doubt whether there had been a real dacoity at all. (The learned Judge read and commented on the evidence of the witnesses and the confession of Koonjo Leth, and continued) :— I need not go further in detail into the evidence. I have stated enough, I think, to indicate the ground upon which we entirely concur with the Judge in thinking that the prisoners, excepting the first one, ought not to have been convicted upon the evidence which is on the record. The confession of Koonjo Leth, of course, could not have been legally used against the others at all excepting to such an extent as it was substantially corroborated by unimpeachable evidence *aliunde*. But so far from this being the case, as I have already mentioned, wherever the confession is really tested it is proved to be false. * * * *
On the whole, then, we think, as I have already said, the prisoners ought not to have been convicted, and that in the interests of justice, all the prisoners, excepting the first prisoner, ought to be acquitted.

But a question of somewhat of a serious character has arisen as to our powers in this case to acquit. The case comes before us in consequence of the Judge having submitted it to this Court under the provisions of s. 263 of the new Criminal Procedure Code. According to that section :—" In cases tried by jury, * * if the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court, and may either remand the prisoner to custody, or admit him to bail. The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so, shall pass such

sentence as might have been passed by the Court of Session."

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Do these words, "shall deal with the case so submitted as with an appeal," mean that the case submitted shall be in all respects considered and situated as an appeal. If so, then it is an appeal, if not preferred by the prisoner, yet preferred on his behalf against a conviction of a jury, and s. 271 says:—"If the conviction was in a trial by jury, the appeal shall be admissible on a matter of law only."

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In the case before us, the ground upon which the verdict of the jury is sought to be set aside is undoubtedly in substance a matter of fact, and not a matter of law. The construction of these words to mean that the case submitted is to be considered essentially as an appeal seems to be somewhat favored by the words which follow,—“but it may convict the accused person on the facts,” because “but” seems to imply something in the way of opposition to, or inconsistency with, what would be the case of an appeal if that “but” was not there. And certainly if the appeal were preferred by the prisoner it would be admissible on matter of law only. At the same time it is also obvious that, in the case of an appeal preferred by the prisoner, the Appellate Court could never have any occasion to convict on the facts, because by the nature of the case, such an appeal must always be an appeal against a conviction already arrived at in the Court below. And in the case of an appeal preferred on the part of the Crown against an acquittal (allowed for the first time by s. 272 of the new Code), it does not appear that there is any restriction imposed relative to the exercise of the discretion of the Appellate Court. Therefore, looking back again to the words of the section which I have already read, it seems to me, on the whole, that the case submitted must, under this section, in the case of a conviction, be intended by the Legislature to be submitted for a wider purpose than simply that of becoming an appeal presented by the prisoner. The words are:—"If the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court." Now the Court may disagree with the verdict of the jury, either on the ground that the jury had

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not followed its directions on a point of law, or on the ground that the jury had found the facts against what appeared to the Judge to be the weight of evidence. If the Legislature had intended the case which was to be submitted by the Judge in the event of a conviction to be limited to a point of law only, nothing would have been easier than to have used words which would have made that limitation perfectly unmistakeable. But the words I have read are, on the contrary, general words without any limitation at all; and it seems to me impossible in reason to construe them other wise than as extending to a disagreement with the verdict on matter of fact as well as on matter of law.

And then the section goes on to say:—"And if the Court considers it necessary for the ends of justice to do so." It appears to me that justice may as much require that a verdict of the jury should be revised in a case in which the jury has gone wrong on facts as in a case where it has made a mistake in regard to law. So that, on the whole, I think there is a really no limitation as to the nature of the case which the Judge may send up to the High Court under this section. In other words, I think, he may submit to the High Court a case in which he disagrees with the jury in their finding of facts, as well as a case in which he complains that the jury has not followed his directions as to the law. And I think, that the word "but" may possibly be used not so much in opposition to the word "appeal" in the first part of the passage, as perhaps in opposition to, or enlargement of the enactment of s. 272. According to s. 272, "the Local Government may direct an appeal by the public prosecutor, or other officer specially or generally appointed in this behalf, from an original or appellate judgment of acquittal; but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court." Construing the word "but" to be used with reference to this section, it would simply mean that, upon a case submitted by the Judge, the Court may, in the event of an acquittal, convict the accused person on the facts, notwithstanding the general prohibition to be found in the words of s. 272 which I have read. Or, again, it may be used with reference to the situation of a case so submitted by the Judge when it comes up to the High

Court. That situation is peculiar in this respect, namely, that no judgment has been passed in the Court below from which this so to speak appeal has been brought ; and this part of the passage may, therefore, mean that, in the event of the Court, upon consideration of the case submitted, being of opinion that there should be a conviction and judgment thereon, it is empowered to pass it as an original Court notwithstanding, and indeed because, there has been none passed in the Court below. However this may be, it seems to me, after the best consideration which I can give to the question, that, on a case submitted by a Sessions Judge under the provisions of s. 263, the High Court can acquit the prisoner if it so thinks fit on the facts, notwithstanding that the jury has found the prisoner guilty.

I construe the words " shall deal with the case so submitted as with an appeal " simply as directing the procedure to be followed, such as regards the notices which are necessary to be served, and so on. And I apprehend that under these words the Court may, if the case calls for it, send for additional evidence ; and may deal with the case generally as is provided in Chap. XX with regard to appeals. No doubt, the result of this construction is, that the prisoner is in a better situation with regard to an appeal, if that appeal be made through the intervention of the Judge under s. 263, than if he had preferred it himself, because s. 271 immediately says that, if the conviction was in a trial by jury, the appeal by the person convicted shall be admissible on a matter of law only. But this is not the only peculiarity of a similar kind which is to be found in this new Criminal Procedure Code, because in the event of the conviction of a prisoner by a jury for the crime of murder and sentence of death following thereon, upon the reference which must be made to this Court for confirmation of the sentence, this Court has the power by s. 283 to acquit the prisoner on the facts, although if the prisoner had been sentenced to transportation for life instead of to death, and had simply himself appealed, the Court would not have been able to disturb the verdict of the jury on the facts.

I am, therefore, of opinion that all the prisoners, excepting the first prisoner, should be acquitted and discharged from custody so far as this conviction is concerned. The case is different with

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regard to Koonjo Leth, because he undoubtedly has confessed to having taken a part in the dacoity, and that confession is ample evidence as against him to support the conviction. As it falls upon us to pass sentence upon Koonjo Leth, we think that the sentence should be three years' rigorous imprisonment.

GLOVER, J.—I concur in this judgment except in so far as doubt is thrown upon the occurrence of the dacoity. I see no reason to discredit the evidence on this point, and the jury were satisfied that a dacoity did take place.

Conviction set aside, except with regard to Koonjo Leth.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

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 May 26.

IN THE MATTER OF THE REGISTRATION ACT, 1871, AND IN THE MATTER OF BUTTOBEHARY BANERJEE.

Registration Act (VIII of 1871), ss. 23, 34, 35, 71, & 73—Effect of Non-appearance within prescribed Time—Refusal to register.

When a document has been presented for registration in due time by one of the executants, but the others have failed to appear within the time prescribed, the registering officer must "refuse to register" as in cases falling under the latter clauses of s. 35, and must record the reasons for his refusal.

The party desiring registration ought to apply to the Register before the period for registration has gone by, either to register or to refuse to register, so as to enable him in case of refusal to take further proceedings under s. 73. So soon as it appears that the prescribed time has gone by, and the executing parties have not appeared, the order of refusal should be made at once.

APPLICATION under s. 73 of the Registration Act 1871, to establish the petitioner's right to have a deed of conveyance to himself registered. The document was executed on the 6th October 1871, and was presented for registration by one of the executants on the 18th January 1872: the other executants did not then appear before the Registrar, and shortly after left Calcutta, to which they did not return till August or September

1872. On the 7th April 1873, the Registrar refused to register the deed on the ground of such non-appearance, and on the 19th April, the petitioner applied for a copy of the reasons for his refusal. That copy was granted on the 21st April, and the present petition was filed on the 7th May.

Mr. *Bonnerjee*, for the petitioner, contended that he had strictly complied with the requirements of the Registration Act, and was entitled to enforce registration. The deed had been presented within the prescribed period, and it was impossible for the petitioner to move in the matter until the Registrar had made his order of refusal.

Mr. *Fergusson*, for the executants, who had not appeared before the Registrar, opposed the application on the ground that it was out of time.

MACPHERSON, J.—I think this application must be refused as being out of time. It is an application, under s. 73 of the Registration Act, 1871, to establish the petitioner's right to have a certain document registered. The document was executed on the 6th of October 1871; it was presented for registration on the 18th of January 1872; upon the 7th of April 1873, the Registrar recorded his reasons for refusing to registrar it; upon the 19th of April, the petitioner applied to the Register for a copy of his reasons, which was granted on the 21st; and the petition now before me was filed upon the 7th of May. Under the Registration Act, it is ordinarily necessary that a deed should be presented for registration within four months from the date of its execution, and no document can be registered unless the persons executing it, or the representatives, assigns, or agents of such persons, appear before the registering officer within the time allowed for presentation. If the registering officer refuses to register, it is his duty at once to make an order of refusal, and to record his reasons for such refusal: and any person who is aggrieved by the order so made may, within thirty days from the date of the order, make such an application as the petitioner has now made to me. S. 23 directs that in ordinary cases presentation for registration shall be within four months. S. 34 directs that

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no document shall be registered unless the parties executing it shall appear before the Registrar within the time allowed for presentation. S. 71 enacts that the registering officer who refuses to register a document shall make an order of refusal, and record his reasons for such order : and s. 73 provides that an application to the Civil Court, in order to establish the right to have the documents registered, must be made within thirty days from the order of refusal. Under certain special circumstances the time for presentation, or for the appearance of the executing parties, may be extended : but there are no such special circumstances in this case. S. 34 does not expressly say that, in the event of the parties not appearing before the Registrar within the time allowed, he is to "refuse to register" the document. It merely says that the document shall not be registered. I think it clear, however, that in such a case, when the document has been presented in due time, the registering officer must "refuse to register" just as in cases falling under the latter clauses of s. 35, and must record the reasons for his refusal. The order of refusal should be made at once, as soon as it is apparent that the prescribed time, has gone by, and the executing parties have not appeared. That delay in making the order of refusal might lead to most dangerous consequences is shown by the circumstances of this very case, where the petitioner comes in May 1873, and attempts to enforce the registration of a document executed on the 6th of October 1871, and the registration of which ought to have been completed (if at all) in February 1872. It is said the petitioner could not move till the Registrar made his order of refusal. But he must be taken to have known the time within which registration ought to have been completed, and should have applied to the Registrar at once, either to register, or to refuse to register, so as to enable him within thirty days to take further proceedings.

The application must be dismissed with costs.

Application dismissed.

Attorney for the petitioner : Baboo Nemy Chunder Bose.

Attorney for the opposing executants : Mr. Carruthers.

PRIVY COUNCIL.

ROY DHUNPUT SINGH ROY BAHADOOR (DECREE-HOLDER) v.

MUDHOMOTEE DABIA (JUDGMENT-DEBTOR).

P. C.
1872
May 2.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Execution of Decree—Limitation—Act XIV of 1859, s. 20 (1).

An execution-sale was stayed by consent for two months, and the execution-suit was struck off the file. During such period the execution-creditor applied to the Court to restore his execution-suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the execution-creditor) had attached them; but it turned out that he had attached them in another suit. *Held*, the application being *bond fide*, the period of limitation began to run from the date of the disposal of the application by the Court.

See also
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THIS was an appeal from a decision of the High Court of the 11th February 1870, reversing a decision of the Subordinate Judge of Dinagapore dated the 11th August 1869.

The question was whether an application made by the appellant on the 24th April 1869 for execution of a decree obtained by him was barred by the 20th section, Act XIV of 1859.

The appellant obtained his decree on the 12th June 1865 for Rs. 8,311-8-6. On the 12th December 1865, he applied for execution, and prayed that certain property held by the respondent as a patni tenure might be sold. On the 24th February 1866, the appellant filed a petition stating that, at the earnest solicitation of the judgment-debtor, and on her promise to pay the amount due within two months, he had agreed to allow two months, and prayed that that time might be allowed, and the sale be stayed. The judgment-debtor also, on the same date, filed her petition to the like effect, and added that the amount would be paid by her with intimation to the Court within the aforesaid two months. On this it was ordered, on the 26th February, by the Principal Sudder Ameen, that the sale should be postponed, and the case struck off the file.

* *Present* :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR MONTAGUE H. SMITH AND SIR ROBERT P. COLLIER.

(1) See Act IX of 1871, sch. 2, cl. 167.

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On the 20th March 1866, the appellant presented a further petition stating the suing out of execution (execution suit. No. 162 of 1865,) and the allowance of two months' time, and further stating that the judgment-debtor had sued out execution against one Mooktocasse Dabia, and had caused her property to be sold, and the amount paid into Court. The petition then alleged that the appellant, while his execution was pending, caused the amount so paid into the Court to be attached, and he now prayed that his execution-suit might be restored to the file, and the attached amount paid out to him. On the same day an order was passed on this petition that it should be entered and numbered, and the record sent for. The report, in obedience to this order, was dated the 3rd May 1866, and was to the effect that no moneys had been attached in execution of this decree, but that in execution suit No. 164 of 1865, between the same parties, Rs. 551 had been attached. Thereupon it was ordered as follows :—

“Whereas no money has been attached in this suit, no orders can be passed for the payment of such money, nor can any other steps be taken. It is accordingly ordered that the case be struck off the file, and the mooktearnama be returned.”

This order was dated the 12th of May 1866. No proceedings to enforce the decree appeared to have been taken from that date until the 24th of April 1869, on which day the appellant petitioned that the execution of the decree, which was struck off the file on the 12th May 1866, should be restored, and that the amount due to him might be recovered by attachment and sale of the judgment-debtor's property ; and an order was made that the petition should be entered under a new number, and the record called for.

In July 1869, the judgment-debtor filed a petition of objection, alleging that the execution of the decree was barred by the law of limitation, on the ground that the last proceeding to enforce it was made on the 26th of February 1866, and that, from thence to the 24th April 1869, a period of more than three years had elapsed. It was also asserted that the proceedings before referred to, and going on from 20th of March 1866 till the 12th May 1866, did not avail to save the time, since they

did not execute the decree. The appellant filed his answer pointing out, among other things, that the judgment-debtor was allowed two month's time from the 26th February 1866, and that the present application for execution of decree was made within three years of the date on which those two months expired.

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The case was heard before the Subordinate Judge, who decided in favor of the appellant on the latter ground, and the objections of the judgment-debtor were overruled.

The Subordinate Judge gave the following reasons for his decree :—

" I do not think the execution of this decree is barred by the statute of limitations ; first, in execution of the decree, sale proclamations were issued against the property of the judgment-debtor ; and on the date fixed for the sale, viz., on the 26th February 1866, the judgment-debtor took two months' extension of time from the judgment-holder, within which time she promised to pay off the entire amount due to him, and on this both parties applied for stay of the sale, which the Court sanctioned, and ordered that the case be struck off the file ; and it was accordingly struck off. When the execution-proceedings were stayed for two months at the instance of the judgment-debtor, she having applied for two months' time, the decree-holder was under legal disability to use any measure during that period of two months for recovering his money through the Court by execution of decree. The pleader for the judgment-debtor argues that s. 20, Act XIV of 1859, applies to execution of decrees alone ; and it lays down that, unless some proceeding shall have been taken to enforce the decree within three years, such decree shall not be executed. So that before this application for the execution of the decree had been filed, no proceeding for the enforcement of the decree had been taken within three years, and consequently that decree has been barred by lapse of time. On this point I would remark that the judgment-debtor having applied for and obtained two months' time and thus stayed all proceedings in Court for that period, and the decree-holder having consented thereto, the Court stayed execution-proceedings ; so that such stay of proceedings can by no means be taken to be neglect or laches on the part of the decree-holder. On the contrary, it may be maintained that the decree-holder was engaged in execution-proceedings during those two months in the manner prayed for by the judgment-debtor. Under such circumstances, how can it be said that

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the decree-holder took no measures during three years to enforce his decree? This decree can, therefore, undoubtedly be executed.

"The second plea taken by the judgment-debtor is that the decree holder, after consenting to give time for those two months, broke the covenant by applying for execution within that period, viz., on the 20th March, and praying that the money under attachment be paid over to him. Consequently he is not entitled to any benefit arising out of that contract. That this argument is useless, is perfectly clear. The decree-holder has in no way committed a breach of that former agreement; he only applied that the money under attachment belonging to the judgment-debtor may be paid over to him. This is not an act against the terms of the agreement. Secondly, should we take it for granted that there has been a breach of that agreement on the date in question, then this application for execution has been made within three years. For all these reasons, the objections raised by the judgment-debtor appear to be groundless."

On the 17th September 1869, the respondent appealed to the High Court against that order of the Subordinate Judge.

On the 11th February 1870, that appeal having come on for hearing, the High Court (Glover and Hobhouse, JJ.) reversed the decision with costs; and held that the appellant was barred from proceeding with the execution of his decree; and that the costs of the present application, and of the Court below, should be paid to the judgment debtor.

The following was the judgment:—

"The question before us is simply this, whether the decree-holder respondent, was, with reference to the provisions of s. 20. Act XIV of 1859, in time, when, on the 24th April 1869, he applied for execution of his decree?

Mr. Paul, for the appellant, contends that the last application for execution was on the 26th February 1866. But without saying it being unnecessary in our view of the case to say, whether it was so or not, we will take it upon the contention of Mr. Allan, for the respondent, that the last application for execution was made on the 20th March 1866. Starting from the 25th April 1869, and going back as the law requires, a period of three years from this date, it is manifest that this application of the 20th March 1866, standing alone, was not an application in the words of the law within three years next preceding the application now before us. But Mr. Allan points out that, acting upon

this application, the Court entered into certain proceedings which did not terminate until the 3rd May 1866; and he contends that the act of the Court in these proceedings must be taken as an act on his part, and that therefore he may take the date of these proceedings, namely, the 3rd May 1866, as the date which represents the last proceeding taken by his client. He relies for this contention on the ruling case of *Ram Sakaye Sing v. Degun Sing* (1). He also relies on the case to be found at page 211 of Mr. Thomson's edition of the Limitation Law of the edition of 1866. These two precedents taken together, and even if they may be said separately, seem to say that the time from which a decree-holder may date his last application is the last date of any proceeding, either of himself or of the Court put in motion by him in furtherance of the application, provided only such proceeding be taken in good faith, that is, as we understand it, with the intention on the part of the decree-holder to arrive at the fulfilment of the decree. It is therefore necessary to consider what was the application made on the part of the decree-holder on the 20th March 1866, and what was in the words of the decision at page 211 of Thomson's Limitation Act, "that substantial act done in furtherance of such application by the Court on which the decree-holder is entitled to rely."

The application of the 20th March was to this effect:—The decree-holder said that in another Court there was a certain sum of money standing to the credit of the judgment-debtor, and he prayed that a proceeding might issue from the execution Court to that other Court directing that the said money should be paid over to his mookhtar. Upon this application, and upon the date of this application, the Court directed that the record should be sent for, and the application, i. e., the execution-application, be restored to the file. After that, we may presume, the records arrived, and on their arrival the usual report was submitted upon them by an officer of the Court, and the Court then, on the 3rd May 1866, passed judgment somewhat in these terms:—It said that, inasmuch as the money in question was under attachment by this very decree-holder in another Court, so the Court could not make an order directing payment of that money to the mookhtar of the decree-holder; and that inasmuch as the decree-holder had taken no further steps in the matter, that is, no steps apparently since the date of the application of the 20th March, to prosecute his decree, so the Court rejected the prayer, and ordered that the execution-proceedings should be struck off the file.

(1) B. L. R., Sup. Vol., 492.

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Now it seems to me upon these proceedings that the utmost that could be said as to any act done by the Court in furtherance of the plaintiff's application to execute his decree, was that act by which the Court sent for the record of the case, in order to pass some order upon the application of the decree-holder. If, therefore, the date of any act done by the Court is to be taken as the date from which the decree holder is to reckon his last application to execute, that application must date from the order of the Court calling for the record; an order which appears to bear exactly the same date as the application, i. e., the 20th March 1866, and so the decree-holder is still out of time. But even if this were not so, I should be quite prepared to hold that the act of making the application was not in itself a *bonâ fide* act in furtherance of the decree. I say this for two reasons, first of all, because I think that when, upon the facts disclosed in the order, the decree-holder was himself the person who was preventing the property that is, the money in question, from being paid out of the Judge's Court, he must have known that he could not, in another execution-case, have got that money paid over to him by the order of another Court. Again, if there had been any real intention, as evidenced by this act of the decree-holder, to execute the decree, we should undoubtedly have seen him following out this act in some practical manner, or we should at least have had some explanation from him as to what he did in the matter of the decree between the 20th March 1866, or putting it at the best, between the 3rd May 1866 and 24th April 1869. Sitting here as a Court of Regular Appeal, we have to determine whether the act of the decree-holder, of March 1866, was done with the real intention of realizing his decree. When, therefore, we find that the act itself was one in which he could not in reason have expected success, and was one with reference to which no explanation has since been offered, and was one not followed up by any other proceeding on his own part for more than three years after the first application, it is impossible, in my judgment, to say that the act was one done in good faith for the purpose of obtaining satisfaction of his decree. This being so, I think that the decree-holder was barred by the application of the statute of limitation when the present application was made to execute it.

I am reminded by Mr. Paul for the appellant that the ground on which the lower Court has passed its judgment has not been touched upon by this Court, and no doubt that is so. I was, however, under the impression that Mr. Allan, for the respondent, was not prepared to

support this decision on that ground, because, as I understood and understand him to admit, the Full Bench Ruling in the case of *Krishna Kamal Sing v. Hira Sirdar* (1), is conclusive upon the point. The point arose on these facts:—The decree-holder on the 26th February 1866 applied for execution, then on that very day both he and the judgment-debtor filed applications to the effect that proceedings might be stayed for a period of two months. This, therefore, took the case down to the 26th April 1866, and the Court below held that this agreement between the parties to postpone execution of the decree was a proceeding on the part of the decree-holder which brought his last application for execution down to 26th April 1866, and so brought it in time from the next application on the 24th April 1869. If the words of the law were not in themselves, as I think they are, quite conclusive against any such contention, the Full Bench Ruling, which I have quoted, is obviously so conclusive.

The order is that the decree of the lower Court be reversed, and that the decree-holder be barred from proceeding with execution, and that he do pay costs in the Court below and in this Court."

The execution-creditor then appealed to Her Majesty in Council.

Sir R. Palmer, Q. C., and Mr. Mortimer, for the appellant.—The decision of the Subordinate Judge was right. The second petition was not intended to affect the arrangement as to the patni talook; and there was in fact only a prorogation of the sale for two months. The case of *Krishna Kamal Sing v. Hira Sirdar* (1) was very different; there the execution was in fact given up. The effect of holding the present case barred by limitation would prevent a *bonâ fide* postponement for a debtor's benefit being made.

Mr. J. D. Bell for the respondent.—The case comes clearly within the principle of the Full Bench decision: the petition agrees to two months time being allowed and the staying of the sale, and the case is then struck off the file. The time must run from that date, or from the 20th March 1866, when he applied to have the execution-case "restored to the file."

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(1) 4 B. L. R., F., B., 101

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The last *bonâ fide* proceeding was on the 20th March 1866—
Maharaja of Burdwan v. Bulram Sing Baboo (1) and *Ram
Sahaye Sing v. Degun Sing* (2).

Sir. R. Palmer, Q. C., in reply.

Their LORDSHIPS gave the following judgment:—

In this appeal the only question which arises is whether within three years preceding the application for execution made in the Court below, any proceeding had been taken to keep the original decree in force; the question depending on the 20th section of Act XIV of 1859. The precise date of the original decree has not been stated, but that date is immaterial, because the question is, whether there was any proceeding within three years preceding the application for execution which was made on the 24th April 1869; and undoubtedly it must be shown that, within three years of that date, some proceeding was taken to keep the original decree in force.

The first proceeding relied on is a former application or suit for execution, the petition in which bore date the 12th December 1865, under which there was an order for the sale of a patni-talook, which was to take place on the 26th February following. On the day of the sale, by agreement, an order was made for the postponement of the sale for two months; and upon that order being made, it was further ordered that the case be struck off the file. It was contended for the appellant that this execution suit must be considered to have continued in living force, although by the suspensory order, no proceedings were to be taken by way of sale for two months, and that the three years did not commence to run until the end of these two months. Their Lordships do not think it necessary to decide that question; they desire to give no opinion judicially upon it; having come to the clear opinion that the proceedings which were founded by the subsequent petition of the 20th March 1866 are sufficient to take the case out of the operation of the Limitation Act.

The petition of the 20th March 1866, which was filed before

(1) 5 B. L. R., 611.

(2) B. L. R., Sup. Vol. 492.

the above-mentioned period of two months had expired, after referring to the decree, and to the execution and the postponement of the sale, alleges that the judgment-debtor had subsequently taken out a decree against a debtor of his own, and sued out execution, and caused some property to be sold, and that the purchase money, an amount of Rs. 551, was received on deposit, and then the petitioner proceeds:—"While my execution was pending, I caused that amount belonging to the judgment-debtor to be attached, and file this petition, and pray that my execution-suit may be restored to the file, and that the aforesaid attached amount, Rs. 551, be paid to my mookhtar." This petition, if *bonâ fide*, would clearly be a proceeding to enforce the judgment, its object being to obtain execution of the money attached. It was referred to the officer of the Court, and the officer upon that reference found that no moneys were attached in execution of the decree in which the petition was filed, that is, the decree in the present suit, but that certain moneys had been attached in another suit between the appellant and the respondents. The report is dated on the 3rd of May. On the 12th of May, an order of the Court is made upon it, which has the following preamble:—"Whereas no money has been attached, no orders can be passed for the payment of such money, nor can other steps be taken. It is accordingly ordered that the case be struck off the file, and the mookhtar-nama be returned." It seems to result from the report of the officer of the Court, and the order made upon that report, that no execution could issue upon the petition in consequence of the money not having been attached in this suit, and that there was another suit between the same parties, in which that sum of money had been attached.

It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bona fides* of the proceeding. Their Lordships could infer from these facts that the petition was a colorable one, not really with a view to

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obtain the money ; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute ; but their Lordships cannot come to that conclusion.

It appears that the decree-holder really desired to obtain execution of this money, and the fair inference is that he had mistaken the suit in which he could apply for execution, and having the attachment in another suit, he, by mistake, applied for execution in the present one, in which he had not obtained the previous attachment which is necessary to ground execution.

Then, assuming it to be a *bonâ fide* proceeding, which failed in consequence of that mistake, their Lordships think that the original petition was a proceeding to enforce the judgment, and to have execution of it ; that it was a continuing proceeding duly prosecuted by the appellant, up to the time of the report, and further up to the time when the judgment was finally given, and that during the whole of such pendency, the decree-holder must be considered as going on with one and the same proceeding. Their Lordships do not consider that the fact that it was in the end abortive, takes from it the character of a proceeding to enforce the decree. The consequence will be that the 12th May 1866, when the petition was dismissed, is the date from which the three years ought to commence to run. This decision is entirely in accordance with the judgment of this committee in the case of *Maharaja of Burdwan v. Bulram Sing Baboo* (1) and does not conflict with any case to which their Lordships have been referred.

The result is that their Lordships will humbly advise Her Majesty to allow this appeal, and to order that the judgment under appeal be reversed, and that in lieu thereof the appeal to the High Court be dismissed, and the judgment of the first Judge be affirmed with costs. The appellant will have the costs of this appeal.

Appeal allowed.

Agent for appellant : Mr. Mortimer.

Agents for respondent : Messrs. Watkins and Lattey.

(1) 5 B. L. R., 611.

APPELLATE CRIMINAL.

Before Mr. Justice Kemp and Mr. Justice Phear.

THE QUEEN v. KHERAJ MULLAH AND ANOTHER.*

1873
April 30.

Code of Criminal Procedure (Act X of 1872), Chap. XVIII, s. 228—Magistrate—Summary Trial—Appeal.

If on appeal from a summary trial under Chap. XVIII of the Criminal Procedure Code, the evidence before the Judge is not sufficient to reasonably satisfy him that the prisoner has been rightly convicted, he ought to acquit him.

KHERAJ MULLAH and Abdool Sheikh were convicted by the Joint Magistrate of Diamond Harbour, on the 1st March 1873, of causing hurt, and were sentenced to rigorous imprisonment for four months and to a fine of fifty rupees, or in default of payment of the fine to two months' further rigorous imprisonment. The trial was conducted under Chap. XVIII of the Criminal Procedure Code (Act X of 1872). The prisoners appealed to the Court of Session. The Sessions Judge, being of opinion that the record of the case did not embody the substance of what the complainant's witnesses stated, which the law intended it should do, and that it was necessary that all the provisions of the law, with respect to what is required to be put on record, should be fully complied with, referred the case to the High Court under s. 296 of the Criminal Procedure Code (Act X of 1872).

The High Court (Kemp and Pontifex, JJ.,) however considered that the judgment of the Magistrate gave the substance of the evidence both for the prosecution and defence (see s. 228 of the Criminal Procedure Code, Act X of 1872), and remanded the case to the Sessions Court of trial.

On remand the Sessions Judge held that it was impossible for him on the record as it stood to say that the Joint Magis-

* Criminal Miscellaneous Case, No. 82 of 1873, from an order of the Sessions Judge of the 24- Pergunnahs, dated the 8th April 1873, affirming an order of the Joint Magistrate of Diamond Harbour, dated the 1st March 1873.

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trate was wrong in believing the witnesses ; that he could not, from the statements of the witnesses on the record, form any opinion as to their credibility ; that there was nothing in the evidence which would warrant him in finding that the witnesses were not speaking the truth ; and that, therefore, it appeared to him that all that the Appellate Court could do in such a case was to see whether the evidence on the record was sufficient to sustain the conviction. The learned Judge examined the evidence, and found that, on the record as it was before him, it was not possible for him to say that the Magistrate came to a wrong conclusion in finding the prisoners guilty of causing hurt. The Judge went on to say that it had been suggested that, under s. 282, the appellate Court had the power of directing further enquiry to be made, or additional evidence to be taken ; but that he could not exercise that power in the present case, for he could not name any particular point which required further enquiry, nor did he know of any additional evidence which the Magistrate had omitted to take, and which he could direct the Magistrate to take ; that what he did think necessary was that the Joint Magistrate should have more fully stated the substance of the evidence on which the conviction was had : that the High Court did not think this to be necessary ; that the evidence as it stood was sufficient to sustain the conviction, and that, therefore, he must reject the appeal.

From this judgment the prisoners appealed to the High Court.

Mr. Ghose (with him Baboo Bykunt Nath Dass) for Kheraj Mullah.—The Sessions Judge ought to have tried the appeal, if he could come to no opinion ; the High Court will quash the conviction. The prisoners are entitled to any doubt.

Baboo Nilmadhub Bose for Abdool Sheikh.

The judgment of the Court was delivered by

PHEAR, J.—It seems to us that the Judge treated the appeal before him more as if it were a special appeal than a regular

appeal; and because he did not find sufficient on the record to convince him that the Magistrate was entirely wrong, he therefore affirmed his decision.

But the Judge was in the situation of an Appellate Court in which the matter came before him on regular appeal, and he ought to have judged as best he could from the materials put before him on the Magistrate's written judgment, whether or not, as a matter of fact, the prisoners had committed the offence of which they had been convicted. On reading the Sessions Judge's judgment, it seems pretty clear that he was unable even with the aid of the Magistrate's finding to form an independent judgment as to whether the prisoners had committed the offence or not. That being so, it was I think his duty to have acquitted them. If the evidence which came before him, whatever its shape, was not sufficient to reasonably satisfy him that the prisoners had been rightly convicted, he ought to have acquitted them.

There is a passage in his judgment which leads us to suppose that the Sessions Judge somewhat misapprehended the effect of the decision of a Division Bench of this Court passed upon his previously made reference. He appears to imagine that he was in some way bound by that decision of this Court to accept the finding of fact come to by the Magistrate. The decision of the Division Bench has been read to us, and Kemp, J., indeed pronounced that decision, and I think it quite clear that it was not the intention of the Division Bench to fetter the Sessions Judge in any way in regard to his judgment on the facts of the case from the evidence such as it was disclosed in the Magistrate's judgment. We think, as I have already said, that so far as we can arrive at the Judges view, he ought to have acquitted the prisoners instead of dismissing the appeal. We accordingly direct that they be acquitted and discharged so far as this charge is concerned.

The fine, if paid, must be refunded.

Conviction quashed.

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PRIVY COUNCIL.

RANEE BHOBOSOONDREE DASSEAH (PLAINTIFF) v. ISSUR-
CHUNDER DUTT AND ANOTHER, (DEFENDANTS).

P. C.*

1872

May 3.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Agreement to transfer—Deed of sale—Ejectment—Specific Performance—
Breach of Contract—Allegations.*

See also
14 B L R 308
13 B L R 499

Where it was agreed between A. and B. that, in consideration of certain proceedings to be instituted jointly by A. and B., and payments to be made by B., for the recovery of certain property claimed by A., against C., A. would make over the half of the property recovered to B.; but A., contrary to the terms of the agreement without the consent of B., compromised his claim with C., and obtain possession.—*Held*, the agreement did not operate as a transfer of the property to B.; she could not sue to eject A.—

Semble.—B.'s proper remedy was a suit for specific performance or for damages for breach of the contract to support which it would have been necessary to allege performance of her part of the contract, or at least readiness and willingness to perform, but prevention by A.

THIS was an appeal from a decision of the High Court (Loch and Mitter. JJ.) dated 10th June 1869, dismissing the appellant's action of ejectment.

One Ramnarin Dutt died, leaving a talook. The respondent Jogessur Ghose claimed it as his heir. The other respondent claimed under a deed of gift from Ramnarin, which Jogessur impeached as a forgery.

While these disputes were going on, the respondent Jogessur applied to the appellant, and asked her to assist him in litigating with the other respondent for the purpose of getting possession of all the property which had belonged to his maternal grandfather, and it was arranged between them that in the event of such litigation arising, she should advance the expenses to the extent of Rs. 3,000, and should protect Jogessur from a then impending execution, the consideration being a moiety of the property claimed.

Present :—THE RIGHT HONORABLE SIR JAMES COLVILLE, SIR MONTAGUE SMITH
AND SIR ROBERT COLLIER.

An agreement in writting was accordingly executed by Jogessur in favor of the appellant on the 14th Bhadro 1273 (29th August 1866), which, after reciting the object of the agreement, proceeded as follows :—

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" It is now necessary to institute a suit in Court for the recovery of possession of the whole of the properties consisting of the aforesaid jote jummah, talook, &c., and mesne profits; and as I have not the means to institute a suit at my own expense, I have determined to sell you a moiety or 8 annas share of the 12 annas 6 gundas 2 cowrees 2 krants of the above jote jummah, being the share left by my maternal grandmother, to which I am entitled; an 8 annas share of the talook aforesaid and an 8 annas share of the mesne profits during the period of dispossession; and having fixed the consideration for the same at Rs. 3,000, and received the purchase-money in cash, I sell the same to you, and execute this deed of sale. The said amount is deposited with Dwarkanath Lahory, mooktear, the agent on your behalf, and all the expenses of the suit for dispossession and my lodging expenses shall be defrayed out of that sum. In the event of the suit being decided in my favor, we shall each of us take the costs, mesne profits, jote jummah, and the talook in the shares mentioned above. We will both of us institute the said suit in Court as plaintiffs. Neither of us shall be able, without consent of the other, to compromise, settle, or make any adjustment whatever of the case. One Ooma Churn Sircar, of Mullickpore, has obtained a decree against me for Rs. 600, on account of money advanced as a loan. If he in the mean time execute the decree, you will pay the amount of the debt from the aforesaid amount of deposit. Whatever sums shall be spent till the final decision of the suit, in excess of the said amount of deposit, you are to pay. You shall never be able to make any demand or claim against me on account of those sums, or the amount of the debt due to the said Ooma Churn Sircar; even if you do, it shall not be admitted. In whatever way the suit is decreed, I will give and receive 8 annas thereof as aforesaid, that is in half shares. The 14th Bhadro 1273."

Nothing more was done under the agreement, no money passed, and Ooma Churn Sircar in the agreement mentioned having taken out execution against Jogessur Ghose, Jogessur applied to the appellant's mooktear to deposit the money, but this was not done.

Thereupon Jogessur, instead of instituting the intended

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proceedings against Issur Chunder, agreed, to an amicable partition, which was embodied in a document dated the 26th Pous 1273 (January 9th, 1867), satisfied Ooma Churn Sircar's decree, and saved his estate.

On the 20th September 1867, the appellant commenced the present suit by filing a plaint against these respondents, and some persons holding as lessees under them, seeking to have the deed of sale executed by Ramnarain declared a forgery, and all the proceedings taken thereunder since his death declared to be fraudulent, and claiming possession of half of the property under the deed executed by Jogessur, together with the mesne profits.

On the 20th July 1868, the Subordinate Judge dismissed the plaintiff's case on the ground that she could not sue alone.

On the 10th September 1868, the plaintiff appealed to the High Court, and on the 10th June 1869, a Division Court (Loch and Mitter, JJ.) held that the Subordinate Judge was wrong in dismissing the suit on that particular ground; but as both parties admitted that the evidence had been given, and the case was ready for hearing on the merits, the Court proceeded to examine the evidence and decide the case on the merits.

After deciding that the deed of gift from Ramnarain was a true document, and that the property claimed under it by the respondent Issur Chunder was properly so claimed, the judgment proceeded as follows :—

“It is urged that the plaintiff has a right to the moiety of whatever property remains to Jogessur, who admits the sale to plaintiff, and whose witnesses prove the execution by him of the bill of sale. Jogessur, however, denies that any consideration passed to him: the plaintiff brings three witnesses to prove that payment in cash was made to Jogessur. Their evidence appears to us inconsistent with the terms of the bill of sale, and highly improbable when considered with that document. The deed sets forth (*recites*). Now it is clear that the money was to remain in desposit with plaintiff, though nominally under the charge of her mooktear, Dwarkanath Lahory, for she bound herself to pay out of that money the amount of Ooma Churn's decree, should he execute it against the vendor, and yet we are told by the witnesses that the

money was paid to Jogessur, and that before the deed was registered. But it is said that it was part of the bargain that Jogessur was to take the money and deposit it with Dwarkanath Lahory, as if it is likely that the plaintiff or her servants would pay over the money to a man in Jogessur's needy position, and trust him to deposit it with another servant of the plaintiff. It appears to us that the evidence of payment is unworthy of credit, and that no consideration actually passed, and that the contract is consequently not a valid contract. The plaintiff has done nothing to fulfil her part of the contract, and we think, therefore, that, under the late ruling of the Privy Council, in the case of *Raja Sahib Prolad Sen v. Baboo Budhu Sing* (1), the present action must fail. We think it very probable, as stated by the witnesses for the defence, that Jogessur having for some cause quarrelled with his relatives, did execute the deed to the plaintiff, who was quite ready to assist him, in hopes of getting an interest in the defendant's property, which she might use to her own advantage. Under this view of the case, we think it unnecessary to determine whether the plaintiff did or did not ask Jogessur to join her in carrying on the suit. No evidence has been given on this point. We dismiss the suit with costs in both Courts."

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The plaintiff then appealed to Her Majesty in Council.

Mr. *Doyns* and Mr. *Mortimer* for the appellant contended that the Court were in error in finding the deed by Ramnarain to be genuine, but even if it were, the plaintiff was entitled to recover one-half of a third. No objection could be taken as to this being champerty—*Fischer v. Kamala Naiker* (2). The suit was properly framed for the purpose of impeaching the proceedings taken by Jogessur, and the High Court were wrong in dismissing the suit.

Mr. *J. D. Bell* for the respondents.—The action is misconceived: whatever right the appellant might have to sue for specific performance or to recover damages, she cannot sue in ejectment—*Raja Sahib Prolad Sen v. Baboo Budhu Sing* (3). Even a suit for specific performance or for damages would not have

(1) 2 B. L. R., P. C., 111, see 116 and (3) 2 B. L. R., P. C., 111, see 116 and 117; S. C., 12 Moore's I. A., 301. 117; S. C., 12 Moore's I. A., 301, see (2) 8 Moore's I. A., 170. 306.

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been successful in the absence of a tender on the part of the plaintiff of performance on her part.

Mr. Doyne in reply.

Their LORDSHIPS gave the following judgment :—

This suit was based upon a deed executed by Jogessur Ghose, in favor of the plaintiff, in August 1866. The effect of that deed, as far as it is material, may be thus stated : it recites that Jogessur Ghose was entitled to certain properties from his maternal grandmother, that he had been dispossessed of the whole of those properties, and thus proceeds (as above, *ante* page 37).

It appears that a short time after, in September 1866, Jogessur Ghose entered into a deed, which may be termed one of compromise, with Issurchunder Dutt, who was the claimant and in actual possession of the greater part of the property referred to in the previous deed, and that by this deed of compromise, a portion of the property was divided between them. Thereupon this suit was brought by the plaintiff. It is material to observe that it is not a suit claiming specific performance, or damages for breach, of the contract entered into with the plaintiff by Jogessur Ghose, but that it is in the nature of an action of ejectment. It is a suit to recover possession of the property mentioned in the first deed brought not only against Jogessur Ghose, but against Issurchunder Dutt, the plaintiff seeking to recover possession of the property by virtue of the title acquired under that deed, not only against Jogessur Ghose, but also against Issurchunder Dutt, whom he alleged to have obtained possession of the property under forged conveyances.

The Court below dismissed the suit upon a technical ground, namely, that the plaintiff could not sue Issurchunder without joining Jogessur Ghose as a co-plaintiff. The High Court decided, in their Lordships' opinion rightly, that this was not a proper ground for dismissing the suit, and hearing it upon its merits, determined it in favor of the defendants.

The principal question is the effect of the first deed, whether it operated as a present transfer of the property, or only as an

agreement to transfer it upon certain contingencies which did not happen. In support of the latter contention, the case was referred to of *Rajah Sahib Prolad Sein v Baboo Budhoo Singh* (1). Without referring at length to that case, the circumstances of which are in many respects similar to those of the present, it may be enough to quote a passage wherein their Lordships say :—

“ The Court below seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespective of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case is in their Lordships’ opinion very questionable. It is certainly not supported by the two cases cited in the judgment under review ” (which are there referred to) “ in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has no possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro* and upon the happening of a contingency of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do ” (2). Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both Jogessur Ghose and the plaintiff were to be parties.

This construction of the deed disposes of the case ; for even if the plaintiff be entitled to complain of breach of contract by Jogessur, she cannot recover under it possession of the property against Jogessur, *a fortiori* cannot she recover against Issur-chunder Dutt, who was no party to the deed. It may be

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(1) 2 B. L. R., P. C., 111; S. C., 12 (2) 2 B. L. R., P. C., 117; 12 Moore’s
Moore’s I. A., 275. I. A., 306.

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observed that, even if this were a suit for specific performance of the contract, or damages for the breach of it, it would have been necessary for the plaintiff to have alleged either performance of her part of the contract, which was the payment of Rs. 3,000 to Dwarkanath Lahory, and such further sums as might have been necessary to the maintenance of the action, or at all events that she was ready and willing to perform this condition, but was prevented by the wrongful act of the defendant. There are no such allegations, and if there had been, it does not appear that they would have been sustained by evidence, for the case set up on the part of the plaintiff was not the performance of this condition, but something very different, namely, the payment to the defendant himself of this sum of money,—a statement which is disbelieved by the High Court, in which disbelief their Lordships concur.

On these grounds their Lordships are of opinion that the judgment of the High Court is right, and they will humbly advise Her Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Agent for appellant : Mr. Mortimer.

Agent for respondents : Mr. Wilson.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mitter.

1873
April 24.

NOJABUT ALI CHOWDHRY (PLAINTIFF) v. SHEIKH MOHA
BUSEEROOLAH CHOWDHRY AND OTHERS (DEFENDANTS).*

*Execution of Decree—Limitation—Sale—Separate Suit—Act XXIII
of 1861, s. 11.*

A. sued for possession of certain lands to which he alleged he was entitled as wussee (executor) under a wusseeutnamah (will), and which B. had fraudulently, during the minority of himself and his brother, caused to be put up for sale under a

* Special Appeal, No. 755 of 1872, from a decree of the Subordinate Judge of Chittagong, dated the 7th February 1872, reversing a decree of the Munsif of that district, dated the 30th September 1871.

decree, the execution of which was barred by lapse of time. B. had become the purchaser at such sale. *Held* that a suit would not lie for the purpose of having it determined that the execution of B.'s decree was barred.

Golam Asgar v. Lakhimani Debi (1) distinguished

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THE plaintiff in this case sued to recover possession of one talook, and to have a declaration of his right to possession of certain other talooks, alleging himself to be entitled to all this property in the capacity of wussee (executor) under a wusseentnamah (will) made by one Nasrut Ali, who was the sole owner of the property in question. It appeared that the plaintiff's father, Nasrut Ali was one of two brothers, Nasrut Ali and Mozoffur Ali, and that the plaintiff himself had one brother Yar Ali, who married and lived at some distance, and was not before the Court. The plaintiff suppressed all mention of his uncle Mozoffur's interest in the property; and in order to account for his doing so, he, as representative of his father set up the wusseentnamah, excluding his own brother Yar Ali, who, as stated above, had married and settled elsewhere. It further appeared that a decree had been obtained by the defendant Busseeroolah against Nasrut and Mozoffur; Busseeroolah in execution procured a sale of the property, and himself became the purchaser thereof. The plaintiff's contention was that the execution of this decree was barred by the law of limitation, but that the decree-holder fraudulently took out execution during the minority of himself and his brother, and so caused the sale of the property. It was admitted that the money due under the decree had never been paid otherwise than by the sale of the property.

The Munsif who tried the case held that the defendant Busseeroolah had fraudulently and illegally taken out the execution of a decree barred by the law of limitation, and had thereby caused the properties to be sold, alleging them to have been left by the father of the plaintiff during the minority of the plaintiff and his minor brother, and that therefore the sale could not be held valid; the Munsif further held that the wusseentnamah relied on by the plaintiff had been proved; he accordingly gave a decree for the plaintiff for one-half of the property, reserving his brother's share.

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On appeal the Subordinate Judge held that the wusseentnamah had not been proved, and, considering that the plaintiff's suit was based entirely on his title under the wusseentnamah, thought it unnecessary to go into the other questions raised, and dismissed the suit.

The plaintiff appealed to the High Court.

Raboo *Nullit Chunder Sen* for the appellant.—The Subordinate Judge was bound to inquire into the question of limitation ; and if it appeared that the execution of the decree under which the property was sold was barred at the time of sale, such sale would be invalid—*Gulam Asgar v. Lakhmani Debi* (1). Even if the wusseentnamah was not proved, the plaintiff would be entitled to some share in this property.

Baboo *Akheel Chunder Sen* for the respondents was not called upon.

The judgment of the Court was delivered by

JACKSON, J. (who, after stating the facts as above, continued) :—The plaintiff comes up here in special appeal, and contends that, even supposing that the wusseentnamah is not made out, yet he was, as son of Nasrut, at all events entitled to some share in the property ; that the Munsif having been of opinion that the execution was barred, and the proceedings consequently fraudulent, he was entitled to the judgment of the lower Appellate Court on that point ; and unless that Court came to a contrary conclusion, he was entitled to a decree for the share coming to him. I am inclined to think that, in so far as the plaintiff sought to recover possession of the property to which he was entitled as the representative of his father, supposing that the facts otherwise entitled him to a decree, he might have recovered notwithstanding the failure of proof of the wusseentnamah, because the effect of that document would only be to entitle him to the whole of his father's share instead of one-half ; but I am also of opinion that, even making that

(1) 5 B. L. R., 68.

concession in favor of the plaintiff, he is not much advanced in the object of the suit. We are referred to a case, *Golam Asgar v. Lakhimani Debi* (1), on which it was held by a Division Bench (I myself being a member of the Court), that the circumstance of the execution of a decree under which a sale had taken place being barred by lapse of time, invalidated the sale which took place under that execution. I entirely adhere to the opinion expressed in that case, but there is this important difference between that case and the present, that in that case apparently, (and I cannot conceive how judgment could have been given in any other state of things,) the fact of the execution being barred was determined by the Court executing the decree, or the Court hearing an appeal from the order of that Court, that is to say, the question must have been raised in a Court which was competent to determine such question under s. 11, Act XXIII of 1861, viz., the Court executing the decree, and not in a separate suit: whereas in the present case the plaintiff brings the suit for the purpose of having it determined that the execution was barred, although the contrary must have been held by the Court which was executing the decree. This I think would be directly contrary to the express intention of the Legislature in s. 11. It is not necessary in this view of this case to advert to the other circumstances which render the plaintiff's claim liable to dismissal.

The charge of fraud against the decree-holder was merely that he was executing his own decree which was barred by limitation to recover his own money and no other circumstance has been alleged or proved to support the allegation of fraud. In this view of the case the special appeal is dismissed with costs.

Appeal dismissed.

(1) 5 B. L. R., 68.

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PRIVY COUNCIL.

P. C.*
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May 31
&
June 4.

RAMCOOMAR KOONDoo AND ANOTHER (DEFENDANTS) v. JOHN AND MARIA McQUEEN (PLAINTIFFS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Vendor and Purchaser—Notice—Equitable Doctrine of secret Ownership.

It is a rule of universal equity, and not one peculiar to English Courts, that, in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title, or that there existed circumstances with ought to have put the purchaser on an enquiry that, if prosecuted, would have led to a discovery of the real title.

THIS was an appeal from a decision of the High Court at Calcutta, dated 2nd April 1869, reversing a decree of the Judge of Hooghly.

In August 1831 Sheikh Kazim executed in favor of Bebee Bunnoo a deed of sale of the land in dispute situated in Howrah. The land being leasehold, she was accepted as tenant by the zemindar. Bebee Bunnoo was in fact the mistress of one Alexander Macdonald, and they lived together in the house, and there was evidence that, while so living together, he built on the land. In 1834 Macdonald made his will, bequeathing the land in dispute to Bebee Bunnoo, stating that it had been taken in her name, and desiring that on her death it might go to his children by her. The female respondent was the survivor of those children. Macdonald died in 1834, and Bebee Bunnoo proved his will in the Supreme Court in the same year, and in the inventory filed in Court, she described this property as Macdonald's. In 1843 she executed a bill of sale in favor of the appellants' father, Ramdhone Koondoo, describing the land as her ancestral holding, and in no way referred to Macdonald. The bill of sale stated that she conveyed with the consent of the members of her family. They were however infants at that time. The price

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR LAWRENCE PEEL.

was Rs. 945, the original price having been Rs. 130 when the lease was bought by Macdonald. The zemindar accepted Ramdhone as lessee in her place, and he got possession. He then built a house upon it, and let it to the male respondent, who, having married the female respondent, remained in possession, and having failed to pay the rent, Ramdhone brought an action of ejectment in the Supreme Court, which, being undefended, resulted in judgment against the casual ejector and possession being obtained. Soon afterwards, Bebee Bunnoo being dead, the respondents brought the present suit as devisees in remainder to eject Ramdhone's family.

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In addition to issues as to *res judicata* and limitation which it is unnecessary to allude to, the material issues raised were whether the property was Macdonald's, whether it came by his will to Maria McQueen, and whether the appellants purchased *bonâ fide* for valuable consideration without notice. These issues were raised before the High Court when the case first came up on appeal on a finding as to limitation, and were disposed of by the High Court without a remand.

The decision of the High Court (L. S. Jackson and Markby, JJ.) was, so far as material for this appeal, as follows : —

"The third issue, as originally drawn, raised the question whether the defendants, the Koondos, being purchasers from Bunnoo Bebee *bonâ fide* for valuable consideration and without notice, could maintain their title. This of course assumes that Bunnoo Bebee had an imperfect title, and that the plaintiff who now seeks to recover the property has a perfect one, and it is an attempt to introduce a very peculiar doctrine of the English Court of Chancery, which is there applied when both the parties claim the extraordinary assistants of that Court. But this doctrine, which is unknown to the general law of England, is equally unknown here. Neither here, nor in England, by the general law does a person gain a title by purchase either to moveable or immoveable property unless the vendor is the real owner, however completely he may act *bonâ fide*. Indeed, a proposition recently made to introduce by legislation a very limited instalment of the contrary doctrine, met with the strongest opposition here.

"The vakeel for the appellant, upon our intimating this view, has sought to amend his issue, and though he has not stated very clearly what he intends to raise, we will assume that he now raises what we

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consider to be the true question, namely, whether the Koondoo bought *bond fide* and for valuable consideration, being induced to believe that the property was Bunnoo Bebee's own absolutely, by the fact that the conveyance and pottah were in her name, and after having made all enquiries which a prudent man would have made under the circumstances, and being without notice of any other title. Now it is clear that, in support of this issue, the purchaser must give some evidence; he must not leave it on mere assertion. This is distinctly laid down by the Privy Council in a case which appears to have been the subject of some misconception, *Varden Seth Ram v. Luckpathy Royjee Lallah* (1), and that ruling we adopt. We do not say how much evidence or what sort of evidence the party must produce, that will depend on the circumstances of the case; but at any rate it must be made quite clear that every possible source of evidence has been exhausted, and that every search has been made, and every effort used to show affirmatively the complete good faith of the purchaser.

"How completely this duty has been neglected in the present case, it is hardly necessary to point out. Only two witnesses are called who speak at all to the circumstances under which the Koondoo purchased, Ram Kristo Banerjee, a karpardaz (agent) of Ramdhone Koondoo, and the person who wrote the documents, but they really proved nothing more than appears on the face of the documents.

"We have no doubt whatever that a prudent purchaser, who wished to act honestly, would, when purchasing from a woman in Bunnoo Bebee's position, have instituted a very strict inquiry as to how she became possessed of the property, and every step in that enquiry would, in all probability, have put the purchaser more and more on his guard; and we see no reason in this case to presume, what indeed they do not venture to assert, that it was impossible for the Koondoo to show what that enquiry was, and what was the result of it.

"In truth, the defendants have not made any real effort to prove this issue at all; what they have really tried to do is to prove that the property was in fact Bunnoo Bebee's own, but in this they have failed.

"It appears to us therefore that this issue, when raised in its proper form, should be found against the defendants."

The decree gave the plaintiffs the property, and against that decree the defendants appealed to Her Majesty in Council,

Sir R. Palmer Q. C., and Mr. Leith (Mr. Doyne with them)

(1) 9 Moore's L. A., 303.

for the appellants.—The judgment proceeds on a strange misapprehension of the doctrine as to the rights of a *bonâ fide* purchaser for value without notice. It is not a peculiar doctrine of the Court of Chancery which we seek to apply, but the simple and broad principles of equity. Here is a case where we purchased, and actually as owners let to the persons now setting up the adverse title of our vendor having only held benami. What was there to put us on enquiry? We bought from Bunnoo Bebee as owner. Even if we had bought from her as executrix, we should have been protected by Fergusson's Act (1).—*Doe d. Cullen v. Clark* (2). But our case is much stronger. Here is the real owner looking on and actually dealing with us as owners, and seeing us build a large house, and now coming forward and saying that our vendor had only a benami title combined with a life-interest given by the person for whom she was benamidar. This cannot be allowed—*Ramsden v. Dyson* (3). Express notice we had none, nor had we even constructive notice. What enquiries could be made? There was nothing in the conveyance to her or in her holding from the zemindar to put us on enquiry. The zemindar accepted Ramdhone as lessee, and there was nothing to cause even suspicion. Even the action of ejectment was not defendant, or any doubt there thrown on the purchaser's title. Bebee Bunnoo was not the wife of Macdonald.

Mr. Cowie and Mr. J. D. Bell for the respondents.—The slightest investigation would have shown the appellants' father that the title was a doubtful one. It was notorious in the neighbourhood that Macdonald was the owner, and had built on the premises, and the wording of the conveyance that Bebee Bunnoo had had the consent of her family to convey must have shown that she had only a limited right. Why were not enquiries made as to what this family consisted of, and whether they did consent? They were infants. There was enough to put him on enquiry, and he must take the consequences of not enquiring—*Worthington v. Morgan* (4), *Whitbread v. Jordan* (5),

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(1) 9 Geo. IV., c. 33.

(4) 16 Sim., 547.

(2) Morton's Rep., 76.

(5) 1 Y. & C., 303.

(3) Law Rep., 1 H. of L., 129.

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McQUEEN.*Bisco v. Earl of Banbury* (1), and *Varden Seth Ram v. Luckpathy Royjee Lallah* (2).

Their LORDSHIPS gave the following judgment :—

Their Lordships do not think it necessary to call upon Mr. Leith to reply, having come to the conclusion that the judgment of the High Court cannot be sustained.

The suit was brought by the respondents to recover 3½ bigas of land and some buildings erected upon it, situated at Howrah, near Calcutta. The land had been purchased by the deceased father of the appellants, Ramdhone Koondoo, from a Mahomedan woman, of the name of Bunnoo Bebee, in June 1843. Their father and they, since his death, have held undisputed possession from that time until the present suit was brought, a period of 24 years.

The short facts are these :—Alexander Macdonald, who lived in Calcutta, and cohabited with Bunnoo Bebee as his mistress, had two children by her,—Alexander Macdonald, who is dead ; and Maria, one of the respondents, who married Mr. McQueen, the other respondent. The father died in 1834. The history of the property appears to be this :—The land, which is perpetual leasehold, at a fixed rent, was conveyed in August 1831 by the then proprietor to Bunnoo Bebee by a deed of sale, and the price paid at that time was only Rs. 130. In the following September the deed was registered, and thereupon the zemindar granted a fresh pottah to Bunnoo Bebee, at the fixed rent of Rs. 35. It does not appear with any certainty that Macdonald, the father, was in possession of the land of the buildings. At all events, it is not clear upon the evidence that he ever resided upon the property. There are two witnesses who speak to his residence. One of them says that he did not live in the new bungalow, and the other says he did. The evidence is far from satisfactory to establish the fact that he really did reside upon the property. But it is clear that after his death, Bunnoo Bebee did go to reside upon it, and she resided there for some time. She afterwards let it, and received the rent

(1) 1 Ch. Cases, 287.

(2) 9 Moore's I. A., 303.

from the tenants. Then, in June 1843, she sold the property to Ramdhone Koondoo, and conveyed it to him by a deed of sale. The price she obtained was Rs. 945, and there is nothing to show that that was not the full value of the property. At the time she sold, she made a surrender to the zemindar of the leasehold interest, and a fresh pot'ah was granted to the purchaser, under which undisputed possession was held for 24 years. During that time the purchaser erected important buildings upon the land, and increased the value to such an extent that the property is valued in the present suit at Rs. 40,000. Bunnoo Bebee died before the commencement of the present suit ; there is a contest as to the time of her death, which was material only as regards the question of limitation ; and as it is not now necessary to consider that point, it becomes immaterial to determine the precise period of her death, whether in 1856 or 1861. Their Lordships, however, see no reason to dissent from the view which the High Court have taken of that fact in the case.

The claim put forward in this suit is that the purchase, although in the name of Bunnoo Bebee, was a purchase benami by Macdonald ; that he was the real purchaser, but had used her name in making the purchase. His will is put in evidence, and the respondents claim under it. Undoubtedly, if the purchase was a benami purchase, they have established a *prima facie* title to this estate, or at least to a moiety of it.

The answer of the appellants is that their father purchased the estate of Bunnoo Bebee without any notice of the benami title, and that they are entitled to hold it, notwithstanding there may have been, originally, a resulting trust in favor of Macdonald. It certainly would require a strong case, to be established on the part of the respondents, to defeat a possession for so long a period, of property for which full value had been given to the person in the apparent ownership of it. The burden of proof lies very strongly on them in such a case. They have of course to establish, in the first instance, the fact that the purchase was really made by Macdonald, and with Macdonald's money, on his own behalf. Their Lordships cannot help observing that the evidence, even on that cardinal fact, is

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extremely scanty. It rests almost entirely on the admission made by Bunnoo Bebee in the inventory made by her after Macdonald's death, in which she treats the property as part of the estate of Macdonald. There is some evidence that Macdonald improved the property after the purchase, by building a new bungalow upon it; but that evidence, without the admission, would clearly be insufficient to establish the fact that the purchase, contrary to all the documents, was made by Macdonald and with his money. Their Lordships however do not feel it necessary to express any definite opinion upon the fact of the purchase being benami, having come to the conclusion that, assuming it was so, the appellants have established their right to hold the property against the benami title.

It is scarcely suggested that the purchaser had any notice that the title was other than or different from the apparent one. None of the documents give any notice whatever that the transaction was other than it appeared to be. On the contrary, all the documents are entirely consistent with the purchase having been made by Bunnoo Bebee herself, or by somebody for her benefit. The case, therefore, cannot be put on the ground of actual notice, but it was said,—and this appears to have been the ground upon which the High Court decided in favor of the respondents,—that there were circumstances, which ought to have put the purchaser upon inquiry, and that if he had inquired, he might have discovered the real title.

It is not necessary to say whether this case is to be decided upon the principles on which the English Court of Chancery acts in cases of resulting trusts, when questions arise between the equitable owner and the purchaser for value without notice; or whether it is to be decided upon the general rules of equity and good conscience, which bind the Courts in India, because the principle of decision must in either case be the same. It is a principle of natural equity, which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his

secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it.

The High Court treat the defence as an attempt to introduce "a very peculiar doctrine of the English Court of Chancery." Their Lordships cannot think that this is a correct view of the defence which is set up in this case. It is one to which, no doubt, the Court of Chancery in England gives effect, but it only gives effect to it in a peculiar manner, because of the distinction in England between legal and equitable estates, and legal and equitable remedies. If this case had arisen in England, the respondents would have had no *locus standi* whatever in a Court of Law, and must have resorted to a Court of Equity.

After the discussion which has taken place, the case seems to result in this:—Whether or not, under the circumstances of this case, the purchaser ought to have inquired? The High Court think that he ought to have made inquiry, because of the *status* and position of Bunnoo Bebee. The learned Counsel, who has argued this case for the respondents, does not himself rely upon that circumstance as one which ought to have put the purchaser upon inquiry, and their Lordships cannot see that there is anything in her position as a Mahomedan woman living with her children upon this estate, and sometimes letting it, which should have put any one upon inquiry whether she was the real owner or not. It is admitted that, if an inquirer had gone to the office of the zemindar, or to the public registry, he would have found that she was the owner. She was in possession, and her former life led to no presumption that she might not have had money to purchase for herself, or that others might not have purchased by way of gift to her; on the contrary, the circumstance that she had cohabited with one or two persons of some property might have fairly led to the supposition either that she had acquired money, or that gifts had been made to her for her advancement and comfort in life.

But circumstances have been relied upon at the bar which were not adverted to by the High Court. In cases of this

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kind the circumstances which should prompt inquiry may be infinitely varied ; but, without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular inquiry ought have been made. It is not enough to assert generally that inquiries should be made, or that a prudent man would make inquiries ; some specific circumstances should be pointed out as the starting point of an inquiry, which might be expected to lead to some result. Mr. Cowie, feeling that the case must really depend upon the existence of such circumstances, has referred to two : first, he says that, if any inquiry had been made, it would have been found that Macdonald had been in possession, and had improved the property. It has been already observed that the facts do not show, with anything like distinctness, [that Macdonald was in possession during his lifetime. There is evidence that he had built upon the property, but, supposing inquiry had been made, and the fact ascertained, it would not lead to the inference that, contrary to the apparent title, he had purchased the land for himself ; for it is quite probable to suppose that he would spend money to improve property which belonged to the woman with whom he was living.

The other circumstances relied on is that, in the deed of sale itself from Bunnoo Bebee to the appellants' father, she says she made the sale with the consent of her family. If this had been shown to have been an unusual clause, or that it had been only usual to insert it in deeds where the consent of the family was really required and obtained, there might have been some ground for the superstructure of argument which was built upon it, but their Lordships have no evidence and no suggestion that this is not in common form on the contrary, it appears that, in the deed of sale to Bunnoo Bebee herself from her own vendor, the same expression occurs. It appears to their Lordships that the clause is one without any specific force or meaning, inserted, like many other general phrases in Indian deeds, to exclude any possible objection that might be raised against them. It is very like that which "so frequently occurs after a full conveyance :—"I and my heirs have no longer any claim."

Those words are often unnecessary, but they are of very frequent occurrence. Their Lordships therefore think that the two facts relied on as those which ought to have put the purchaser on inquiry do not support the contention made at the bar, and that the whole case of the respondents fails on its substantial merits.

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Other questions have been raised in the case with which it is not now necessary to deal. Their Lordships, in the result, are glad to come to a conclusion by which it is quite evident substantial justice will be done. There has not been a suggestion throughout of any collusion between the purchaser and Bunnoc Bebee, or that the purchase was not made entirely *bonâ fide* on his part, and without notice of any title other than that he took from her.

In the result their Lordships will humbly advise Her Majesty to allow this appeal and to reverse the judgment of the High Court. Their Lordships will further advise Her Majesty that the suit be dismissed, and that the appellants should have the costs in India and of this appeal.

Appeal allowed.

Agents for appellants Messrs. *Walters and Gush.*

Agents for respondents : Messrs. *Clarke, Son, and Rawlins.*

APPELLATE CIVIL.

*Before Sir Richard Couch, Kt., Chief Justice Mr. Justice L. S. Jackson and
(Mr. Justice Mitter).**

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April 23.

**KALLY PROSONNO BOSE (PLAINTIFF) v. DINONATH MULICK
(DEFENDANT).***

*Execution of Decree out of Jurisdiction of Court which passed it—Sale of
Estate partly within and partly without the Jurisdiction—Civil Procedure
Code (Act VIII of 1859), ss. 249, 284, 285, § 286—"Part of an
Estate"—Certificate of Non-execution—Jurisdiction—Nominal Purchaser—
Benami—Non-joinder.*

A money-decree was made by the Judge of the 24-Pergunnahs against a mortgagor, who was possessed of property in the 24-Pergunnahs, and also of an estate called Kismut Kosdaha, 18 mouzabs of which lay in Zillah 24-Pergunnahs, and 42 mouzabs in Zillah Nudd ea. The whole estate was entered in the *taujih* of, and the Government revenue was payable in, the Collectorate of Nudd ea. The Judge of the 24-Pergunnahs, without selling the property of the judgment-debtor which was within his jurisdiction, transmitted a certificate, under s. 285 of the Civil Procedure Code, to the Judge of Nudd ea, stating that no portion of the amount of the decree had been realized by the Court of the 24-Pergunnahs. Thereupon, Kismut Kosdaha was attached and sold by order of the Nudd ea Court. In a suit brought against the purchaser for possession of the 18 mouzabs lying in the 24-Pergunnahs by a person who claimed to have bought the right, title, and interest of the judgment-debtor in those mouzabs, but who, in fact, was not the real purchaser :

Held, that the suit ought to have been dismissed, because of the non-joinder as plaintiff of the real purchaser.

Held further, that "part of an estate" in s. 249, Act VIII of 1859, means an aliquot part of an estate.

Held also, that although the Court of the 24-Pergunnahs strictly ought not to have granted the certificate until the property in the 24-Pergunnahs had been sold the error in so doing did not make the certificate void, or avoid the proceeding in the Nudd ea Court, Kismut Kosdaha being substantially in the Nudd ea District.

The Maharajah of Bardwan v Sree Narain Mitter (1) commented on.

THE facts of this case were that the Land Mortgage Bank, having obtained a decree in the Court of the 24-Pergunnahs

* Regular Appeal, No. 12 of 1872, from a decree of the second Subordinate Judge of the 24-Pergunnahs, dated the 12th October 1871.

(1) 9 W. R., 346.

against Hubeebul Hossein and his wife, Dooreentunnissa Bibee, for Rs. 2,48,991-4, principal and interest, and Rs. 4,493-12, costs and interest, applied to that Court for execution of the decree by attachment and sale of a dwelling-house and land in Bhowani-pore, in Zillah 24-Pergunnahs, and of property described as Lot Kosdaha, Pergunnah Kosdaha, in *tauji* No. 298, in Zillah Nuddea, the Government revenue of which was Rs. 11,261-11-4. On the 25th of August 1867, it was ordered that the property situated within the local jurisdiction of the Court of the 24-Pergunnahs should be attached. On the 26th of August, the Land Mortgage Bank, by its manager, petitioned the Judge that the property in the 24-Pergunnahs should be sold, and a certificate be granted as regarded the property situated in Zillah Nuddea for the attachment and sale thereof in that zillah. On the 1st of September, it was ordered by the Judge of the 24-Pergunnahs that the original certificate, copy of the decree, and copies of the two petitions, should be sent to the Judge of Zillah Nuddea, and the case should be struck off from the file of the cases, pending decision in that Court. The attachment and sale of the property in the 24-Pergunnahs was not proceeded with. The certificate of the Judge of the 24-Pergunnahs, dated the 1st of September, stated that no portion of the amount of the decree had been realized by means of that Court. The Land Mortgage Bank thereupon applied to the Subordinate Judge of Nuddea for execution of the decree by attachment and sale of the right, title, and interest of the judgment-debtors in "Kismut Kosdaha lying within Thannah Gyeghata, mehal No. 298 of the *tauji* of the Collectorate of this zillah, the Government revenue of which is Rs. 11,261-14-4, and which is recorded in the name of Hubeebul Hossein." It was accordingly attached and sold by auction to the respondent for Rs. 3,00,100. Kismut Kosdaha consisted of 60 mouzahs; 18 in Zillah 24-Pergunnahs, and 42 in Zillah Nuddea, the whole being entered in the *tauji* of the Collectorate of Nuddea as "No. 298, Pergunnah Kismut Kosdaha, talookdar Hubeebul Hossein, Government revenue Rs 11,261 14-4." Hubeebul Hossein, applied under s. 256 of Act VIII of 1859 to have the sale set aside; and the case was tried on the 14th of April 1870, when the Subordinate

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Judge of Nuddea ordered that the sale should be confirmed. Among the pleaders present on behalf of Hubeebul Hossein was Baboo Kedarnath Bose.

The plaintiff then brought the present suit to have the sale set aside. The plaintiff's case was that the Nuddea Court had no power to sell the 18 mouzahs ; and that the sale of them was void. He alleged in his plaint that Hubeebul Hossein, in consideration of Rs. 5,000, had absolutely sold to him on the 19th Magh 1277 (31st January 1871) whatever rights and interests he had in those mouzahs. But the evidence of Kedarnath Bose, who was examined as a witness for the defendant, and who said that he was Hubeebul Hossein's pleader in almost all cases, showed that he, Kedarnath Bose, was the real purchaser. He said that he and the plaintiff, who was his cousin, were living jointly, and the property, if recovered, would become their joint property. The plaintiff's suit was dismissed by the Subordinate Judge, and he appealed to the High Court.

Mr. Woodroffe (Baboos *Mohesh Chunder Chowdhry* and *Anund Chunder Ghosal* with him) for the appellant.

The *Advocate-General*, offg. (Mr. Paul) (Baboos *Sreenath Doss* and *Bhuggabutty Churn Ghose* with him) for the respondent.

Mr. Woodroffe and Baboo *Mohesh Chunder Chowdhry* contended, 1st, that the execution-proceedings were void, inasmuch as the Judge of the 24-Pergunnahs had no power to grant a certificate under s. 286 of Act VIII of 1859 ; and, 2ndly, that, even assuming the certificate to have been rightly granted, the Nuddea Court was incompetent to sell property situated beyond the local limits of its jurisdiction. As a general rule, it is the duty of a Court which passes a decree to execute that decree. By s. 284, where the decree "cannot be executed within the jurisdiction of the Court whose duty it is to execute the same," it "may be executed within the jurisdiction of any other Court in the manner" provided by the succeeding sections. Therefore, before a decree made by one Court can be sent for execution to another Court, the first Court must satisfy itself that the decree

cannot be executed within its own jurisdiction—*The Maharajah of Burdwan v. Sree Narain Mitter* (1). Nothing in ss. 285 and 286 extends the authority granted by s. 284. In the present case the judgment-debtor had property in the 24-Pergunnahs which might have been sold in satisfaction of the decree, and this appeared on the face of the petition itself upon which the certificate was granted. So long as that property remained available, the Judge of the 24-Pergunnahs had no authority to grant a certificate: execution-proceedings based on his illegal certificate were absolutely void, and could pass no property to the purchaser at an execution-sale. With regard to the second point, a portion of the property was without the jurisdiction of the Nuddea Court. [JACKSON, J.—The estate originally was wholly, and now the greater portion of it is, situated within the Civil District of Nuddea. COUCH, C.J.—The Government revenue is till payable in Nuddea.] The right of a Court to sell property is based on the attachment sections of the Civil Procedure Code; ss. 232, 235, and 239, which relate to execution against immoveable property, all refer to property within the jurisdiction—*Haji Jiva Nur Muhammad v. Abubakar Ibrahim Meman* (2). Suppose a claimant under s. 246 were to allege that he had at a private sale bought the portion of the estate lying without the local limits of the jurisdiction, could the Court adjudicate on his claim? The whole purview of the sections referred to shows that the power of the Court to attach is only co-extensive with its power to give possession. Where, upon sanction obtained under s. 12 of Act VIII of 1859, a suit is brought for immoveable property partly within and partly without the local limits of jurisdiction, execution might possibly issue against the whole, but that case is very different from the present one in which the property has been attached in execution of a simple money-decree.

Baboo Sreenath Doss for the respondent.—The plaintiff's suit was rightly dismissed, the Judge having found that the nominal plaintiff was not the real purchaser. In this country,

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(1) 9 W. R., 346.

(2) 8 Bom. Rep., O. C., 29, at p. 37.

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where there is no distinction between legal and equitable estates, the only person who can sue is he who has the beneficial interest. [MITTEE, J., referred to *Grishchandra Lahury v. Fakir Chand* (1). COUCH, C.J.—Can we dismiss a suit simply because the plaintiff is wrongly named?] The point was decided in *Fuzeelun Beebe v. Omdah Beebe* (2). It is not a

(1) B. L. R., Sup. Vol., p. 503.

(2) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

The 7th December 1868.

FUZEENLUN BEEBE, WIDOW AND
HEIRS OF SHAIKH ABDOOL
WAHED (PLAINTIFF) v. OMDAH
BEEBEE AND ANOTHER (DEFEND-
ANTS).*

*Parties—Sale of Land—Benami—Non-
joinder of real Purchaser—Vakael and
Client.*

THIS was a suit for 'possession of property valued at Rs. 13,764. The plaintiff stated that the defendants, Omdah Beebe and her brother Syud Shah Jonab Ali, were the two shareholders of property left by their father; that the respective shares having been determined in a suit brought against Omdah Beebe by her brother, Omdah Beebe sold a *mokurrari*, lease of part of her share to the plaintiff for Rs. 100, and subsequently sold to him a further part of her share, together with a moiety of her proprietary rights in the property included in the *mokurrari* for the sum of Rs. 3,000. The *mokurrari* was alleged to have been obtained, and the purchase made by the plaintiff through the instrumentality and with the assistance of his paternal uncle Moonshee Keramut Ali. The plaintiff produced the deed of sale, which recited that out of the Rs. 3,000, the sum of Rs. 2,500 was to be satisfied by setting off an old debt, the nature of such debt not being stated; the remaining Rs. 500 was paid in cash.

The defendants alleged, *inter alia*, that

Shaiikh Abdool Wahed was only the nominal plaintiff, and that Moonshee Keramut Ali, had got up the case and forged the *mokurrari* pottah and deed of sale, and that, as he had not been joined as a co-plaintiff, the suit ought to be dismissed.

Mr. Money (with him Baboo Joggoda, and Mookerjee) for the appellant.

Baboo Ashootosh Chatterjee, Girja Sunker Mojomdar, and Gopesh Nath Mookerjee for the respondents.

The judgment of the Court was delivered by

PEACOCK, C.J.—(The portion of the judgment relating to the point mentioned was as follows):—The first issue in bar is whether the suit is bad by reason of Keramut Ali not having been made a co-plaintiff in it?

That involves two questions: first assuming that a sale took place by Mussamut Omdah Bdebee, the defendant No. 1, whether Abdool Wahed was the real purchaser, or whether his father-in-law Keramut Ali, the vakael of Omdah Beebe, was the real purchaser of the estate from his client?

The suit is valued at Rs. 13,764. Of part of the property for which the suit is brought a *mokurrari* was purchased for Rs. 100 in the name of the plaintiff Abdool Wahed. As to the residue of the property, it is said that it was sold to the plaintiff for the sum of Rs. 3,000 of which Rs. 500 were paid, and the residue settled by giving up certain debts. There is no evidence in the

* Regular Appeal. No. 98 of 1868. from a decree of the Principal Sudder Ameen of Beerbhoom, dated the 15th February 1868.

condition precedent to the grant of a certificate under s. 286 of Act VIII of 1859 that the Court should satisfy itself that the

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cause to induce me to believe that bonds legally due from Omdah Beebes to the extent of Rs. 2,500 either to Abdool Wahed or to moonshee Keramut Ali were ever delivered up. If Keramut Ali was the real purchaser, I believe that no more was actually paid than the Rs. 100 and Rs. 500 for this property, valued at Rs. 13,764. I have already pointed out on delivering judgment upon the second issue on the merits that the bill of sale speaks of debts generally, and not of bonds, and there is no specification anywhere, either in the bill of sale, or in any memorandum at the foot of it, of what the alleged debts for Rs. 2,500 consisted, or of the dates or amounts of the alleged bonds. It may be, but it is unnecessary to enter into that question now, that Keramut Ali had some claim against someone for costs which had been incurred in the suit between No. 1 and No. 2 defendants; but there is no evidence to induce me to think that defendant No. 1 ever owed any money whatever to the plaintiff Abdool Wahed. If, therefore, Keramut Ali was the real purchaser, and the name of his son-in-law Abdool Wahed was used as a blind, and that it might not appear that the purchase was a purchase by the vakeel from his client, Keramut Ali ought to have been made a party to the suit as plaintiff, in order that the sale of the *mukurrari* and the absolute interest in the land might have been impeached.

Speaking of the relationship of client and attorney, Story, J., in his *Equity Jurisprudence*, s. 310 8th Edition, says.—“It is obvious that this relation must give rise to great confidence between the parties and to very strong influences over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to

obtain undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which, between other parties, would be held unobjectionable. It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief (which may be brought about by means, secret and inaccessible to judicial scrutiny) from the dangerous influences arising from the confidential relation of the parties. By establishing the principle that, while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts or bounty, or other negotiations of the former, it supersedes the necessity of any enquiry into the particular means, extent, and exertion of influence in a given case, a task often difficult and ill-supported by evidence which can be drawn from any satisfactory sources.” These remarks apply with equal force to the relationship of a vakeel and client, and it is very important that this principle should be generally known; and it is equally important that the Courts should in these cases take care that they are not blinded by allowing transactions of this nature between pleaders and their clients to be enforced in the name of a third person put forward as the real purchaser.

Assuming, therefore, that the husband had the authority of the wife to execute the *mukurrari* pottah and the bill of sale, or assuming that the fact was, as some of the witnesses would wish to make it appear, that she actually touched the pen with which her name was signed by the husband, I have no doubt that Keramut Ali, the vakeel, was the person really interested in those documents, and that his son-in-law Abdool Wahed's

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decree cannot be executed; the certificate is to be given when satisfaction has not been obtained; see s. 285. But, however that may be, the certificate having been granted, it must be presumed that the Court did satisfy itself. Further, assuming that the certificate was illegally granted, the defendant ought to have objected before the Nuddea Court before execution, under s. 290. *Saroda Prosoud Mullick v. Luchmeseput Sing Doogur* (1) shows that a decree may be transmitted to different Courts, concurrently, for the purpose of execution; if the impossibility of execution is a condition precedent to the grant of the

name was used as a mere color. The husband swears that the whole transaction took place between him and the vakeel in collusion, and that the wife knew nothing about it. I do not believe the evidence of Keramut Ali in which he states that he has neither taken nor purchased the property in the benam of the plaintiff had Abdool Wahed, and that the plaintiff and full right in the disputed property. He wishes it to appear that his son-in-law had purchased the property out of some money which he had previously given to him; and if his evidence is to be believed, it would appear that the whole purchase-money was paid, for he says nothing of debts or bonds being given up as part-payment of the purchase-money. He says:—"Previous to the purchase of a portion of the said property, I made a gift of some money to plaintiff, as he is my son-in-law, and I have this son-in-law and no son. With that money, the said plaintiff purchased and took in *mokurra* the said property." On cross-examination he says:—"I made the gift of the money subsequent to marriage. I cannot exactly remember in what year I made a gift of Rs. 4,600 previous to 1270 (1863), and gave some money also in that year. My son-in-law, the plaintiff, did not meet jointly with me. Plaintiff is paying the costs of this suit, and I am conducting it on his behalf. I have no interest in the suit." I do not believe that the plaintiff did pay, or was paying the costs of the suit, or any part

of it. If the son-in-law to whom this liberality had been extended was really paying his father-in-law in advance the costs of conducting the suit, much clearer and more reliable evidence upon that subject could and ought to have been given. Two mohurirs of the pleader Keramut Ali both prove that he was the man who advanced the money, and the witness Zamin Ali specially proves that the said Moonshee (Keramut Ali) having purchased certain property with his own money in the name of his son-in-law Abdool Wahed, said one day in the presence of respectable witnesses that he had caused the *mokurrari* and the bill of sale to be purchased in the name of his son-in-law, and had made them over to him. We have, therefore, clear evidence that the purchase was made by Keramut Ali, benami in the name of his son-in-law and we have Keramut Ali's own evidence to show that he never made them over to his son-in-law, for he swears that his son-in-law originally purchased it. I have no doubt that, if the defendant No. 1, Omdah Beebee, executed those conveyances Keramut Ali, and not the plaintiff, was the real purchaser. I therefore think that the first issue in bar must be decided in the affirmative, that is to say, that the suit cannot be maintained in the name of the plaintiff. That I think is the substance of the issue.

(1) 10 B. L. R., 214.

certificate, it follows that the Court issuing the certificate ought to satisfy itself of the impossibility of executing the decree in one district before transmitting a copy to another. A decree may be executed in several ways ; and so long as any mode of execution—e.g., by imprisoning the judgment-debtor—can be made effectual, it cannot be said that the decree “ cannot be executed.” Those words in s. 284, read by the light of the two succeeding sections, must mean “ cannot satisfactorily or conveniently be executed ;” and the words “ unless there be any sufficient reason to the contrary” in s. 286 clearly show that impossibility to satisfy the decree is not a condition precedent in all cases. The *dictum* of Phear, J., in *The Maharajah of Burdwan v. Sree Nurain Mitter* (1), relied upon by the appellant’s Counsel was merely *obiter*. [COUCH, C.J.—If this estate could not be sold otherwise than as one entire estate, the opinion of the learned Judge would not stand in your way ; because the decree clearly could not be executed in the 24-Pergunnahs.] The estate was one entire estate, paying one sum as Government revenue : the sale of the whole estate was asked for, and, considered as a whole, the estate is in the Nuddea District. *Háfi Jivá Nur Muhammad v. Abubakar Ibráhim Meman* (2) was a ruling on s. 81, which applies only to attachments before judgment. Act VIII of 1859 must be reasonably construed ; but the construction contended for on behalf of the appellant would prevent the sale of any estate which lies partly within one, and partly within another, jurisdiction.

The *Advocate-General* on the same side (3).—The certificate was rightly granted, and at all events cannot now be objected to. Act VIII of 1859 contains no express provisions for the sale in execution of an estate like this, but it could never have been intended that such property should enjoy complete immunity. To sell the estate in fractions would materially reduce the price, and would, moreover, be impracticable in consequence of the impossibility of apportioning the Government revenue.

(1) 9 W. R., 346.

(2) 8 Bom. Rep., O. C., 29.

(3) He was not present in Court at the commencement of the argument for the respondent.

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Having regard to ss. 213, 239, 248, and 249 of the Civil Procedure Code, it is submitted that this estate must be taken to be substantially within the civil district of Nuddea. There being no law applicable to the case, the Court acting on principles of justice, equity, and good conscience will not set aside the sale no injustice having been done.

Baboo Mohesh Chunder Chowdhry in reply.

Cur. adv. vult

The judgment of the Court was delivered by

COUCH, C.J. (who after stating the facts as above, and remarking that "the striking off the file of the Court, seems to have been improper, and we fear was caused by the very prevalent desire to show as few pending suits as possible," continued).—It has been objected for the respondent that the suit ought to have been dismissed, because the plaintiff was not the real purchaser. In *Fuzeelun Beebee v. Omdah Beebee* (1), it was held that, where a purchase was made in the name of another, the real purchaser must be the plaintiff, and the suit cannot be maintained in the name of the other person. Taking the evidence of Kedarnath Bose to be entirely true, he ought, by the rule of Courts of Equity, to have been a co-plaintiff; and for his not being so, the decree might be reversed on an appeal; the reason being that Kedarnath Bose will not be bound by the decree in this suit. We think this would be a sufficient reason for our dismissing this appeal. A false case as to the purchase has been put forward in the plaint; and we have little doubt that this was done designedly and in order to conceal the part which Kedarnath Bose had taken in the transaction. It is, however, desirable that the case should be decided on its merits.

We think the Nuddea Court had power to sell the whole estate, and that, for the purposes of attachment and sale in execution of a decree, it must be considered as wholly situated in Zillah Nuddea. If the Court of the 24-Pergunahs sold the 18 mouzahs, it would

(1) Ante P. 60.

have no power to apportion the Government revenue. The purchaser would be liable to pay the whole, and would be involved in constant disputes with the owner of the other mouzahs. Selling the estate thus in parts would greatly lessen the price that could be got for it, to the injury either of the decree-holder or the judgment-debtor, but possibly to the benefit of speculative persons such as the pleader Kedarnath Bose seems to be in this stance. Unless the law is imperative, this ought to be avoided. The Code of Civil Procedure has no special provision for such a case as this. "Part of an estate" in s. 249 means, we think, an aliquot part of an estate, which must frequently be attached and sold. In the proceeding in the Nuddea Court, it was possible to follow the directions of the Code as to making known the prohibitory order (s. 239) and as to sales (ss. 248. 249), and they have been followed. There is no direction in the Code to the contrary of this proceeding; and it appears to us that the estate may, as we have said, be considered as wholly in Zillah Nuddea. Then, so considering it, was the Nuddea Court authorized to sell? S. 284 says that a decree which cannot be executed within the jurisdiction of the Court whose duty it is to execute it, may be executed within the jurisdiction of any other Court in the manner following. The plaintiff (s. 285) may apply to the Court whose duty it is to execute the decree, to transmit a copy of it with a certificate that satisfaction of it has not been obtained by execution within the jurisdiction of that Court. It will be observed it is not that the decree cannot be executed. The Court (s. 286), unless there be any sufficient reason to the contrary, is to cause the certificate to be prepared and transmitted to the Court which is to execute the decree; and (s. 287) the copy of any decree or order for execution, when filed in the Court to which it has been transmitted for execution, is to have the same effect as a decree or order for execution made by that Court. There was a certificate of the Judge of the 24-Pergunnahs that the amount of the decree had not been realized by means of that Court. It was made upon the application of the plaintiff (The Land Mortgage Bank) in accordance with s. 285, and there was a decree to be executed. Those two facts were sufficient.

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to give the Court of 24-Pergunnahs jurisdiction to grant the certificate. Strictly it ought not to have been granted until the house and land in 24-Pergunnahs had been sold; but this error does not make the certificate void and a void the proceeding in the Nuddea Court. There is a wide distinction between a proceeding without jurisdiction, or in excess of jurisdiction. and an erroneous proceeding in a matter within jurisdiction. The latter is ground for an appeal, and one was presented, but not till the 15th of June 1870, after the time allowed by law. In the case of *The Máharajah of Burdwan v. Sree Naráin Mitter* (1), there was an appeal, and we understand the language of the Court in the judgment as used with reference to the case before it. We do not think the learned Judges intended to lay down that, when a decree has been executed by a Court other than that by which it was passed, the title of the purchaser may be avoided by showing that there was property of the judgment-debtor within the jurisdiction of the Court that passed the decree which might have been attached and sold. The judgment, indeed, goes so far as to say that it is only when the decree cannot be executed against the property or person of the judgment-debtor that it may be sent to another Court for execution. This would render it necessary in all cases before a decree is sent to another Court for execution for the sending Court to enquire whether the defendant can be arrested, and if he can, to refuse the application. We believe it has not been the practice to do this. We are of opinion, upon the facts of the case, that the decree of the lower Court is right, and the appeal ought to be dismissed with costs.

Appeal dismissed.

(1) 9 W. R., 346.

Before Mr. Justice Jackson and Mr. Justice Mitter.

AZIM NULLA MOODEEN (DEFENDANT) v. W. D. CRUIKSHANK.

AGENT, BANK OF BENGAL, RANGOON (PLAINTIFF).*

1873.
April 16.

Execution of Decree—Variation—Order made by Consent.

The High Court, on appeal from a judgment of the Recorder of Rangoon, directed that an account should be taken between the parties, and that in default of payment of the amount thereby found to be due from the defendant to the plaintiff within three months, a sale of the mortgaged property should be effected. On the 18th March 1872, an order was passed by the Recorder of Rangoon, which was as follows:—"By consent the property subject to the equitable mortgage be given up to the plaintiff in satisfaction of all claims and demands against the defendant under the decree of the High Court." On the 3rd July 1872, the Recorder directed the defendant to execute within six days a conveyance of the mortgaged property to the plaintiff. On the 11th July 1872, the Recorder declared that, if the conveyance was not executed within twenty-four hours by the defendant, the Court would execute it, and accordingly on the 12th July 1872, the Court executed the conveyance. *Held* that the Recorder had no power to pass the order of the 18th March 1872, and that the defendant could not be required to execute the conveyance.

THIS appeal arose out of the Regular Appeal No. 120 of 1871 between the same parties, and decided by the High Court in favor of the present respondent. The facts disclosed in that regular appeal, as far as they are material to the present case, were these:—The present respondent was an equitable mortgagee of certain property, which was, subsequently to the mortgage, sold in execution of a decree against the mortgagor; the present appellant, who became the purchaser, bought with notice of the respondent's mortgage, but claimed to hold the property discharged therefrom, on the ground that the transaction with the mortgagor was one beyond the power of the respondent to enter into; he relied on *Ibrahim Azim v. Cruikshank* (1). A suit was instituted in the Court of the Recorder of Rangoon by the respondent to have his rights declared, and on appeal the High Court, on the 25th August 1871, order an account to be taken, and directed that, in default of payment of the amount

*Miscellaneous Regular Appeal, No. 295 of 1872, from an order of the Recorder of Rangoon, dated the 10th and 11th July 1872.

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thereby found due to the present respondent within three months, the mortgaged property should be sold in the usual manner. It appeared that difficulties arose in proceeding to sell the mortgaged property, and an agreement was come to between the present appellant and respondent, whereby it was agreed that the latter should take over the mortgaged property in full satisfaction of his claim. On the 18th of March 1872, an order was passed by the Recorder of Rangoon, sanctioning this agreement; the order ran as follows:—"By consent the property subject to the equitable mortgage be given up to the plaintiff in satisfaction of all claims and demands against the defendant under the decree of the High Court." Under this order the respondent tendered to the appellant for execution a conveyance to him of his right, title, and interest in the mortgaged property; this he would not do, but put off the respondent from time to time until the 3rd July 1872, when the respondent put in a petition, stating the above facts and also the further facts that, on the 29th April 1872, the respondent had tendered for the approval of the Judge of the Recorder's Court of Rangoon the deed of conveyance which had been submitted by him to the appellant for execution, and that the same had been approved of by that Judge. The petition went on to pray that an order should issue to the appellant, directing him to execute the conveyance within two days, and that, in default of his so doing, the Court would be pleased to execute the conveyance in the appellant's name. On this petition the Court, on the same day, ordered that the appellant should execute this conveyance within six days. The appellant, on the 8th July 1872, presented a petition to the Recorder, in which, after referring to the order passed by consent on the 18th March 1872, and to the order of the 3rd July 1872, he submitted that he had only given his right to have an account taken, and to redeem the land under the decree of the High Court, but that it was never understood that he should execute a transfer and waive his right to a refund of the purchase-money paid by him to the original mortgagor. The Court on the 10th July 1872, passed an order on that petition, stating that any matter between the appellant and the original mortgagor must be settled between themselves, and

that all the appellant was required to do was to transfer by the deed his own right, title, and interest in the mortgaged property. On the 11th July 1872, the appellant presented a second petition to the effect that he had never consented and did not consent to execute a conveyance to the respondent, and prayed that the original decree of the High Court might be executed according to the terms thereof. On the 11th July the Recorder declared that the deed of conveyance would be executed by the Court unless the appellant executed it within twenty-four hours: this order the appellant failed to comply with, and accordingly the Court, on the 12th July 1872, executed the conveyance.

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The defendant appealed to the High Court.

Mr. *Twidale* for the appellant.—It was not competent for the Recorder to go beyond the terms of the decree of this Court. The Court executing a decree is bound to execute it as it finds it, and cannot add or in any way alter the terms of the original decree even by consent of the parties—*Krishna Kamal Sing v. Hiru Sirdar* (1). Moreover, it is denied that the defendant consented.

The *Advocate-General*, offg. (Mr. *Paul*) for the respondent.—The orders of the Recorder are perfectly correct. The appellant consented that the mortgaged property should be handed over to the Bank, and this consent was made an order of Court. Where property is sold by an order of Court, and the purchaser wants a conveyance, the Court will compel the necessary parties to execute it. Whether or not a supplemental decree can be executed is the question, and the case of *Krishna Kamal Sing v. Hiru Sirdar* (1) nowhere says it cannot. The decree is the same, but by the consent-agreement the plaintiff is enabled to carry out the terms of it more expeditiously. The Court was empowered to compel the execution of the conveyance; if not, the plaintiff will be compelled to bring a fresh suit, and there is no reason for making him do that. [JACKSON, J.—This is a decree of the High Court, and the question is whether the parties can change that decree by consent]

(1) 4 B. L. R., F. B., 101.

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Decrees are often altered and amended by consent on the original side of the Court. The Recorder's Court is regulated by the same practice as the original side. [JACKSON, J.—As regards procedure, the Recorder is governed by Act VIII of 1859, and there would be no difficulty if the whole of the proceedings had taken place in his Court.] A party can give up property, and so agree to satisfy a decree which has been passed against him : here the appellant consented to give up his equity of redemption : it is simply an agreement between the parties as to how the decree is to be executed. Suppose a decree is passed against a man for Rs. 10,000 and he comes into Court and says such a sum is deposited to his credit in Court, and agrees that this sum should be transferred to satisfy the decree, but he afterwards draws back from this, would the Court compel the decree-holder to bring a fresh suit ? It is submitted the Court would order the debtor to complete the agreement entered into. If the appellant really contends that he never consented, then an inquiry can be ordered, but the plaintiff ought not to be compelled to bring a fresh suit.

Mr. *Twidale* was not called upon to reply.

The judgment of the Court was delivered by

JACKSON, J.—It appears to me that, irrespective of the question as to whether or not the appellant before us really consented to the arrangement recited by the Recorder, which consent appears to me to be extremely doubtful, and to require some investigation, it was beyond the power of the Recorder to substitute for the decree of the High Court a new decree altogether, and to require the appellant to execute a conveyance in favor of the opposite party. I think this order of the Recorder must be set aside, and he should be desired to carry out the decree of the High Court. If follows that all acts done under the said order of the Recorder will be of no effect. We make no order as to costs.

Appeal allowed.

PRIVY COUNCIL.

KOOLDEEP NARAIN SINGH (PLAINTIFF) v. THE GOVERNMENT OF INDIA, MAHADEO SINGH AND OTHERS (DEFENDANTS).

P. C.*
1871
July 18.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Ghatwal—Resumption—Hereditary Tenure—Purchaser at Auction sale.

A purchaser at an auction-sale cannot, where lands are held under an hereditary ghatwali tenure originally created before the decennial settlement and at a fixed rent, resume those lands on the suggestion that the ghatwali services are no longer required.

See also
14 B L R 119
14 B L R 138
18 B L R 129

The omission of words of inheritance does not show conclusively that a sanad is not hereditary, it being shown that a ghatwali tenure had descended from father to son, it was held that it was an hereditary tenure.

THIS was an appeal from a Full Bench (Peacock, C. J., Trevor, Loch, L. S. Jackson, and Pundit, JJ.) decision dated 8th September 1866 (1).

It was a suit instituted by a purchaser at a sale for arrears of Government revenue to obtain possession of land held by the defendants (other than the Government) under a ghatwali tenure : the plaintiff alleged that the ghatwali services had long since been dispensed with, and that there was no necessity for the services. The Government supported the claim of the ghatwal.

The ghatwal claimed under a sanad dated 1743, which contained no words of inheritance, but it appeared that the land had descended from father to son through several generations. The land was held on a ghatwali service, and at a quit-rent of Rs. 61 per annum.

The Principal Sudder Ameen of Bhaugulpore, considering himself bound by the decision in *Munrunjun Singh v. Raja Leelanund Singh* (2), dismissed the suit. L. S. Jackson, J., having some doubt as to whether that decision was correct, the case was referred by him and Markby, J., to a Full Bench.

* *Present* :—THE RIGHT HON'BLE SIR JAMES COLVILLE, SIR R. PHILLIMORE SIR, JOSEPH NAPIER, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEEL.

(1) B. L. R., Sup. Vol., 559.

(2) 3 W. R., 84.

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The judgment having affirmed (although the Judges differed in their reasons) the decision of the Principal Sudder Ameen, the zemindar appealed to England.

Sir *R. Palmer*, Q. C., and Mr. *Doyle* (Mr. *W. C. Mozoomdar* with them) for the appellant.—The appellant, being an auction purchaser, can set aside all tenures which the zemindar could have set aside. There was no hereditary tenure, and the respondent held under circumstances that entitled the zemindar to put an end to the tenancy. The case of *Rajah Leelanund Singh v. Nuseeb Singh* (1) is in point, and was rightly decided; see also *Musammut Sona v. Rajah Leelanund Singh* (2) and *Raja Leelanund Singh v. Surwan Singh* (3). The ghatwali services have long since been waived by the Government, and the Government has no right now to have these lands held as appropriated to ghatwali services—*Raja Leelanund Singh v. The Government of Bengal* (4), *Forbes v. Mir Mahomed Taki* (5). The 41st section of Regulation VIII of 1793 gives a clear right to destroy this tenure. This is a reasonable service tenure—*Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo* (6).

Mr. *Forsyth*, Q. C., and Mr. *Pontifex* for the Government.—There has been no renunciation by Government of its claim to have the services performed. They may be called for at any time. The tenure is one that an auction-purchaser cannot annul. The case of *Forbes v. Mir Mahomed Taki* (5), referred to by the Counsel for the appellant, is clearly in favor of the respondents—*Joykishen Mookerjee v. The Collector of East Burdwan* (7).

Sir *R. Palmer*, Q. C., in reply.

Their LORDSHIPS gave the following judgment:—

This is a suit brought by an auction-purchaser to resume possession of certain villages held under the tenure known as

(1) 6 W. R., 80.

(2) 5 W. R., 290.

(3) *Id.*, 29.

(4) 6 Moore's I. A., 101.

(5) 5 B. L. R., 529; S. C., 13 Moore's I. A., 438.

(6) 7 Moore's I. A., 128.

(7) 10 Moore's I. A., 16.

the ghatwali tenure. It does not appear to be an ordinary suit for resumption and reassessment ; for the plaintiff claims a right to the possession of the land from the date of the auction-sale, with mesne profits from that time ; but the substantial question raised in the cause is whether the appellant, an auction-purchaser, having acquired the rights of the zemindar with whom the original settlement was made, is entitled to resume and put an end to the ghatwali tenure. It has been found as a fact by the Courts below (and their Lordships must assume that finding to be correct) that this tenure existed in its present form before the decennial settlement. The original sanad granting the ghatwali tenure is far more ancient. The first document produced goes back to the year 1743, and that sanad appears to refer to and recite a former sanad. There is no mention in this document of the rent reserved, but there does appear to their Lordships to be, as there appeared to the Judges of the High Court to be, on the record, proof that the rent payable in respect of these manzas at the date of the decennial settlement was the present rent of Rs. 61. The auction-purchaser, therefore, coming in by virtue of the sale, would appear to have no right to disturb this tenure in the ordinary way in which an auction-purchaser can sweep away encumbrances created since the decennial settlement. The only advantage which he gains by the character of auction-purchaser is that he is relieved from any difficulty arising from the law of limitation, and that he is not conclusively barred by the acts or the omissions of the former zemindar, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the zemindari. It would seem, therefore, that if he has any right at all to destroy the tenure, it must be by virtue of that clause which has been cited from Regulation VIII of 1793, s. 41, relating to *chakiran* or service lands. That enactment does not seem to have been much discussed below, but their Lordships fail to see upon what the title of the auction-purchaser can depend, if it does not depend upon that. Their Lordships further consider it to have been properly found by the Courts below that this tenure is an hereditary tenure. It is true that the sanad which is produced contains no words of

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inheritance, but it is in their Lordships' knowledge that, before the acquisition of the Dewanny, before the British power became the ruling power in India, it was extremely common where a tenure was in fact hereditary, when it practically passed as hereditary from father to son, to take out a new sanad upon each descent. Therefore it appears to their Lordships (and they are under the impression that it has been so decided here, as it appears to have been decided in the High Court) that the omission of words of inheritance does not show conclusively that the sanad was not hereditary. Then there is the strongest possible evidence that these tenures have descended from father to son; that they have, in fact, been hereditary, and their Lordships are, therefore, of opinion that the conclusion to which the High Court came upon that point was correct.

The question then is, whether, upon the suggestion the these ghatwali services have ceased to be necessary, the zemindar has a right to resume the lands, and to turn out the person who have enjoyed them for such a long period of time. Now, heir Lordships think that the principle which should govern his case is that which was laid down in the case of *Forbes v. Mir. Mahomed Taki* (1), which has been referred to. They concur in the view entertained by the Chief Justice, and in fact by all the Judges who sat with him, that, under the circumstances of this case, the right does not accrue to the zemindar on the mere suggestion that the services have ceased, or that they are no longer necessary. They are by no means prepared to say that, if the Government, who had clearly a joint interest with the zemindar in the continuance of the services when necessary, were not here disputing the zemindar's right, that the zemindar would, as between him and the ghatwal, have any right so to resume the land; they are disposed to think that upon the principle laid down in the case just referred to, that right would not exist. The case which has been cited in support of a right so to dispossess the ghatwal is a case decided on the 5th July 1866, the case of *Leelanund Singh v. Nuseeb Singh* (2). That case was decided by two of the learned

(1) 5 B. L. R., 529; S. C., 13 Moore's I. A., 438.

(2) 6 W. R., 80.

Judges who sat in the High Court in the case now under appeal, Kemp and Jackson, JJ., who seem to have considered that the land being held in lieu of wages and on a *puasi* contract for service, the zemindar was at liberty to determine the tenure when the services were no longer required. In that case, however, the ghatwals were said to hold the land, not under a sanad conferring an hereditary and indefeasible right, but "on the payment of a quit-rent, with enjoyment of the profits of the land in lieu of wages ; but such possession, however long, would not entitle them to hold the land at a fixed jumma, or to retain a portion of the land after they have ceased to perform the duties for which the land was assigned to them." It would appear, therefore, that the particular tenure there in question was very different from the present tenure. If it were of the same nature, it is clear that the two learned Judges who decided that case have departed from their former opinion, since they have concurred in the judgment now under appeal. Jackson, J., indeed differed from the rest of the Court as to the conclusion that the tenure was hereditary,—he did not think that the evidence was sufficient to make that out,—but in all other respects he joined with his brethren in pronouncing the judgment now under appeal. It seems to their Lordships that they would be taking upon themselves a very great responsibility, if, upon a question of this kind, a question of tenure peculiar to India, and upon which the judgment of Indian Courts, is so valuable, they were to overrule the unanimous and carefully considered judgment of a Full Bench of the High Court, particularly when that judgment appears to them to be entirely consistent with the general principles of justice and equity. They must therefore humbly recommend Her Majesty to dismiss this appeal with costs.

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Appeal dismissed.

Agent for appellant : Mr. Wilson.

Agents for Government : Messrs. Lawford and Waterhouse.

APPELLATE CIVIL.

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Nov. 20.

Before Mr. Justice Phear and Mr. Justice Ainslie.

RAM PERSHAD SINGH AND OTHERS (DEFENDANTS) *v.* NEERBHOY SINGH (PLAINTIFF).*

Suit for Contribution—Cause of Action.

The mere existence of a decree against one of several joint debtors does not afford ground for a suit for contribution against the other debtors (1).

THIS was a suit to recover Rs. 5,324-15-6. The plaint stated that—

"The plaintiff, Tundun Singh, and Monoruth Singh were three uterine brothers; that all the three brothers, while living jointly, carried on business jointly and also purchased properties jointly; that certain moneys were borrowed under bonds dated respectively 1st Aghan 1270 F. S. (7th November 1862) and 1st Pous 1271 F. S. (26th December 1863) from one Gossai Munraj Pooree for the management of the joint business and for joint gain; that in this state of things, one of the three brothers, Monoruth Singh, having died, the survivors, that is, the plaintiff and Tundun Singh, purchased a certain property from one Kessolall, and, for the purpose of making up the consideration-money, borrowed a further sum from Gossai Munraj, and thereupon executed a bond dated the 15th August 1864, to secure repayment of all these sums,—that is, the two sums which the three brothers had previously borrowed from Gossai Munraj, and the third sum which the two brothers after the death of the one had borrowed from the same creditor; that the amount so borrowed was applied to the aforementioned purposes, the property was purchased, and possession jointly obtained by the plaintiff and Tundun Singh after some litigation which was necessary to obtain it. Subsequently to this, the two surviving brothers, the plaintiff and Tundun Singh, separated, and, on the occasion, of separation, executed each to each certain *ikrarnamahs*, by which each undertook to pay his share of the joint debts; that Gossai Munraj brought a suit upon the basis of the bond against the present plaintiff

* Regular Appeal. No. 260 of 1871, from a decree of the Subordinate Judge of Gya, dated the 18th July 1871.

(1) See *Trailakhanath Roy v. Kashenath Roy*, 6 B. L. R., 633.

and the defendants, the representatives of Tundan Singh, and obtained a decree against the present plaintiff only; that the money covered by this bond was borrowed at the time of the joint tenancy, and expended in the joint business for joint benefit; and that, therefore, according to law, and stipulation entered into in the *ikramamah* of the said date, the debt was chargeable to the plaintiff and Tundun Singh, and upon his death, the defendants, in equal shares, that the decree-holder was about to sell the plaintiff's property; that the cause of action arose when the decree was passed against the plaintiff in favor of Gossai Munraj."

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Hence the present suit to recover a moiety of the amount decreed in favor of Gossai Munraj.

The defendants set up (*inter alia*) in their written statement that, as the plaintiff had not paid the amount decreed in favor of Gossai Munraj, he had no cause of action, and that the suit ought to be dismissed.

The Subordinate Judge held that the decree having been passed exclusively against the plaintiff, he had a right of action for recovery from the defendants of the proportionate amount of the money so decreed; that "the acquisition of this right is not dependent on the payment of the decretal money; for the plaintiff is exclusively liable under the said decree. Had the decree been joint, it could have been said that he (the plaintiff) could not obtain a rateable share from his co-sharers without payment of the joint debt." He accordingly passed a decree in favor of the plaintiff.

The defendants appealed to the High Court.

Baboo *Kalimohun Doss* and *Ohunder Madhub Ghose* and *Mr. C. Gregory* for the appellants.

Mr. Allan and Baboo *Moheschunder Chowdhry* and *Nilmadub Sein* for the respondent,

Baboo *Kalimohun Doss*, for the appellants, contended that the suit was premature. In a suit for contribution, the cause of action does not arise, until the plaintiff has satisfied the debt—*Boykantonath Saha v. Gourmonee Dasse Chowdhra* (1) and *Ramkrishna Roy v. Madan Gopal Roy* (2). The decree

(1) 2 W., R., 150.

(2) 6 B. L., R., App., 103.

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of Gossai Munraj is still unsatisfied. The obligation of the defendants to contribute arises from their having received some benefit from the acts of the plaintiff. Here the defendants have received no benefit, and consequently there is no cause of action.

Mr. *Allan*, for the respondent, contended that, as the plaintiff's property had been attached in execution of the decree of Gossai Munraj, he had a cause of action against the defendants for contribution. The plaintiff is not bound to wait till the sale of his property in execution of the decree. As the defendants are shareholders of the property for the purchase of which the debt was incurred, they are bound to pay their portion of the debt. A decree may be passed declaring the defendants' liability to contribute. There are cases in which declaratory decrees have been passed, although no consequential relief was granted—*Gabindprasad Tewari v. Udai-chand Rana* (1) and *Shewakram Roy v. Syad Mahommed Shamsul Hoda* (2).

Baboo *Moheschunder Chowdhry*, on the same side, contended that, as the defendants had denied their liability to pay their share of the debt incurred by the plaintiff, the money so raised ought to be considered as the private property of the plaintiff. The amount was spent in the purchase of a property for the benefit of the joint family, and the defendants are in the enjoyment of their share of this property. The plaintiff, therefore, is in the position of a Hindu, who has applied his private funds for the augmentation and improvement of the joint family property, and as such he is entitled to be reimbursed from his co-sharers the money so advanced. The obligation of the defendants in this case arises not because a joint debt has been satisfied, but because the defendants are in the enjoyment of properties purchased with the plaintiff's private funds. They cannot insist upon the plaintiff's payment of the loan as a condition precedent to his right to demand payment from them.

(1) 6 B. L. R., 321.

(2) 3 B L R., A. C., 196.

The following judgments were delivered :

PHEAR, J. (after stating the pleadings and judgment of the lower Court).—On appeal to this Court the defendants repeat this objection, and we are of opinion that the objection is a good one. The claim of the plaintiff in this suit belongs to a class of cases in which the principal feature is, that one person out of several having discharged a joint obligation is entitled to sue the others in order to obtain contribution from them. In this case the obligation has not been discharged. But the plaintiff urges that he is nevertheless entitled to have a declaration as against the defendants that they are liable to be called upon by him to help him to discharge the obligation. The decree of the Court below has gone much further even than this: it has, without any qualification whatever, directed the defendants to pay the plaintiff a certain share of the money which the plaintiff has been decreed to pay to Gossai Munraj. The general principle which underlies almost all classes of right to contribution has been explained and illustrated by Story, J., in several parts of his work on Equity Jurisprudence. In s. 477 (1), he says :—"Cases may easily be stated, where apportionment of a common charge, or, more properly speaking, where contribution towards a common charge seems indispensable for the purposes of justice, and accordingly has been declared by the common law in the nature of an apportionment towards the discharge of a common burden. Thus, if a man, owing several acres of land is bound in a judgment, or statute, or recognizance, operating as a lien on the land, and afterwards he alienes one acre to A, another to B, and another to C, &c., there, if one alienee is compelled, in order to save his land, to pay the judgment, statute, or recognizance, he will be entitled to contribution from the other alienees. The same principle will apply in the like case, where the land descends to parceners who make partition; and then, one is compelled to pay the whole charge; contribution will lie against the other parceners." And in a judgment of Lord Chief Baron Eyre's (referred to in a note to the 8th Boston edition of Story), it is said :—"If we take a view of the cases, both in law and equity, we shall find that contribution is

(1) 8th Edition.

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bottomed and fixed on general principles of justice, and does not spring from contract, * * * * and the reason given in the books is that, *in æquali jure*, the law requires equality. One shall not bear the burden in ease of the rest." So, again, in s. 491, Story, J., says:—"By the general rule of the maritime law, in all cases of general average, the ship, the freight for the voyage, and the cargo on board are to contribute to the reimbursement of the loss according to their relative values." And in s. 492, he says:—"Another class of cases, to illustrate the beneficial effects of equity jurisdiction over matters of account, is that of contribution between sureties who are all bound for the same principal, and upon his default, one of them is compelled to pay the money, or to perform any other obligation, for which they all became bound. In cases of this sort, the surety who has paid the whole is entitled to receive contribution from all the others, for what he has done in relieving them from a common burden." And in the next paragraph:—"The claim certainly has its foundation in the clearest principles of natural justice; for, as all are equally bound, and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all." I should also add that, in s. 478, he remarks incidentally that each party "is liable to contribute only for his own portion," and that hence in proceedings at law, separate actions may become necessary against each, and so, to prevent multiplicity of suits, recourse is best had to a Court of Equity. In *Davies v. Humphreys* (1), which was an action brought by one surety against a co-surety, Mr. Baron Parke (afterwards Lord Wensleydale), in delivering the judgment of the Court of Exchequer, said:—"What then is the nature of the equity upon which the right of action depends? Is it that, when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a portion of the burthen, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him, or some one liable, before he has a right to sue for contribution at all? We are not without

(1) 6 M. & W. 153, see 168.

authority on this subject, and it is in favor of the second of these propositions. Lord Eldon, in the case of *Ex parte Gifford* (1), states, that sureties stand with regard to each other in a relation which gives rise to this right amongst others that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay : and he expressly says, 'that, unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other.' And this appears to us to be very reasonable for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt ; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other ; and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the statute of limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date, it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits and to a great inconvenience, if each surety might sue all the others for a rateable proportion of what he had paid the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other,

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in order to prevent multiplicity of suits ; indeed, convenience seems to require that Courts of Equity alone should deal with the subject ; but the right of action having been once established, it seems clear that, when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing."

The present case, no doubt, differs somewhat from the case, of sureties *inter se*, because the obligation of each surety is originally to pay the debt of a third person. In the present instance, as the claim is laid in the plaint, the defendants are co-principals with the plaintiff, each being bound to pay only his own share of the debt, to discharge his own part of the obligation. Consequently the principle, which I have endeavoured to explain as the principle of equity upon which this class of cases depends, goes, I may say, more strongly against the plaintiff here than if he was simply a co-surety with the defendants. He is bound, according to his own statement of the case, in the end, to bear a definite portion of the original debt ; and it does seem to me to be stretching the principle a very long way to maintain that he has a right to come into Court and ask to be paid by his co-sharers before he has done anything whatever himself, even to discharge his own portion of the obligation. Moreover, he has himself disclosed in his plaint that the defendants have been by a competent Court acquitted of all obligations to pay the original creditor. The plaintiff cannot call upon them by his own showing to pay Gossai Munraj. His only right, if he has a right at all, is to call upon them to pay himself, and it seems to me, after the best consideration that I can give to this case and to the authorities which I think must be our guide in it, that he has no right to come into Court to ask that they be made to pay him until he can show that he has done something on their behalf. It seems to me that, until he has discharged that which he says ought to be treated as a common burden, or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co-debtors, and which he can call upon them to share with him.

The fact that Munraj has obtained a decree against him as

alleged in the plaint, is not alone, I think, of any importance in this suit under its present form. That decree merely declared authoritatively as between the present plaintiff and Munraj the existence of an obligation, which must now be taken to have existed previous to the suit in which the decree was made. The decree did not materially alter the character of that obligation : nor did the decree, in further ordering the mortgaged property to be sold unless the debt were paid, as we are told it did (although the plaint is silent on this point), place any new burden on that property, for it thus only gave effect to Munraj's already existing mortgagee rights. If then the plaintiff has a good cause of action in this suit, notwithstanding the fact that Munraj's decree remains altogether unsatisfied, he must have had that cause of action before the decree was passed ; but no one has ventured to urge before us that this was so. The *ikrars* do not, I suppose, amount to a cause of action in themselves, otherwise they would have been sued on. The cases to which we have been referred by the learned pleader for the defendants, so far as they go, bear out this view. They were cases in which it was decided that the time for the purposes of barring a suit under the Limitation Act, does not in a suit of this sort begin to run until the plaintiff has paid the sum towards which he calls upon the defendants to contribute. In other words, the cause of action upon which he sued did not arise until he had paid that money.

It appears to me, therefore, on the whole, that the objection made by the defendants in this suit to the effect that the action is the form which the plaintiff has given it is premature, and that no cause of action is disclosed by the plaint as actually existing, is a good objection, and ought to have been allowed to prevail in the Court below. This conclusion, I think, is fortified by considering how difficult it would be to frame any decree upon the footing of the plaint in this case. The decree which has been passed by the lower Court is clearly wrong. It is not just, and it is not in accordance with the principle upon which the plaintiff must, if at all, place his right of suit, that the defendants should be ordered to pay to him without qualification, without conditions, a specified portion of

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the whole debt, interest, and costs decreed against him in another suit towards which he has not himself yet contributed a pice. And if such a decree cannot be made, the only alternative would be a decree declaring that the defendants ought,—in the event of the plaintiff's making a payment under and in discharge of Munraj's decree,—to contribute towards that payment in certain shares. But it is obvious that a decree in this form would be simply an interlocutory decree, and could only be made use of in some future proceeding or suit to be instituted when the present plaintiff may be in a position to come forward and say that he has paid the money. By passing such a decree, this Court would be doing that which I believe it invariably abstains from doing, namely, declaring judicially the relations between parties, not for the purpose or with the power of giving relief or remedy at the present time, but for the purpose of the declaration so made being used as a part of a judicial proceeding on some future occasion. In saying this, I do not at all forget or lose sight of the class of cases to which Mr. Allan called our attention, and in which the immediate action of the Court may be invoked, in order to prevent the future perpetration of a wrong or the future occurrence of irremediable mischief to the plaintiff when there is danger of either unless some such remedy be at the moment afforded to him. But here the plaintiff does not even suggest an equity of this sort, and I see no reason whatever why a part of this suit, so to speak, should be heard and determined now, while the remainder must be left to be finished in some future litigation. If the plaintiff could have alleged that his own separate property was mortgaged by the bond of 15th August 1864 at the request of Tundun Singh, that the money so borrowed was applied with Tundun Singh's sanction to the benefit of the joint property, and that afterwards the brothers separated and divided this joint property between them, I think that he would by such a plaint lay a good ground, upon which might be maintained an equity on his part to call upon Tundun Singh (or his representatives) at any time to help, in the proportion of his share in the joint property, to disencumber his (the plaintiff's) land; in other words, to aid the plaintiff to this

extent in redeeming the mortgage of 1864. At any rate there is authority for saying that the English Court of Chancery would recognize such an equity—*Lee v. Rook* (1). And if this be so, and if the suit brought by Munraj on the bond (2) was, as seems probable from the from of the decree (2) made in it on the 28th February 1871, essentially a suit for foreclosure or sale, inasmuch as such a suit would be to the present plaintiff a last opportunity to redeem, it would follow that he has a right to ask Tundun Singh's representatives to aid him in preventing the sale under that decree by paying into Court in that suit on the present plaintiff's behalf and in his name one moiety or other proper share of the money which was secured by the bond. Judging from that which has been disclosed to us in this matter, I can conceive it possible that the facts are such as would enable the plaintiff to make against the defendants a case of the character which I have just supposed. But, unfortunately, he has not done so in the plaint which before us, nor have the issues been tried in this suit which is would almost necessarily have arisen between the parties, if the plaint had taken the suggested form. I have been led to make the foregoing remarks, although they are perhaps not all strictly relevant to the determination of this suit, because I have been very reluctant to give a decision in this case which must have the effect of rendering useless all the proceedings which have been taken, and all the expenses incurred up to this time, and by upholding the preliminary objection, we shall unquestionably leave it open to the parties to litigate the same matter over again, probably at no very distant period: and under these circumstances I am anxious to mark out as distinctly as possible the exact ground on which our present decision rests. On the whole, I do not see how otherwise than by consent of parties we can pursue any course other than that of dealing with the objection raised by the defendants upon its strict legal merits, and consequently I feel myself obliged to say I think that the plaint, upon the materials before us, does not

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(1) *Mosely*, 318.

of the case as the record had been

(2) The bond and the decree there on returned to the Zillah Court before the

have not been set out in the statement report was drawn up.

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disclose a complete cause of action, and that the suit ought to have been dismissed in the Court below.

It seems to me, therefore, that we must dismiss the suit with costs.

AINSLIE, J.—I concur with my learned colleague in thinking that the preliminary objection taken by the respondent must prevail.

As to how a suit may be framed which would enable the plaintiff to bring an action against the defendants before he (plaintiff) himself shall have paid the full amount that, on his own allegations, represents his share of the debt under the decree obtained by Gossai Munraj, I do not wish to express any opinion.

Appeal allowed.

PRIVY COUNCIL.

P. C.*
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 April 27.

RAJAH CHUNDERNATH ROY (DEFENDANT) v. KOOAR GOBIND-NATH ROY AND OTHERS (PLAINTIFFS).

THE COLLECTOR OF MOORSHEDABAD (DEFENDANT) v. RANEE SHIBESSUREE DABEA (PLAINTIFF).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Adoption—Nattore Raj—Stridhun—Endowed Lands—Sheba—Presumption—Mode of Dealing with Evidence—Weight of Evidence.

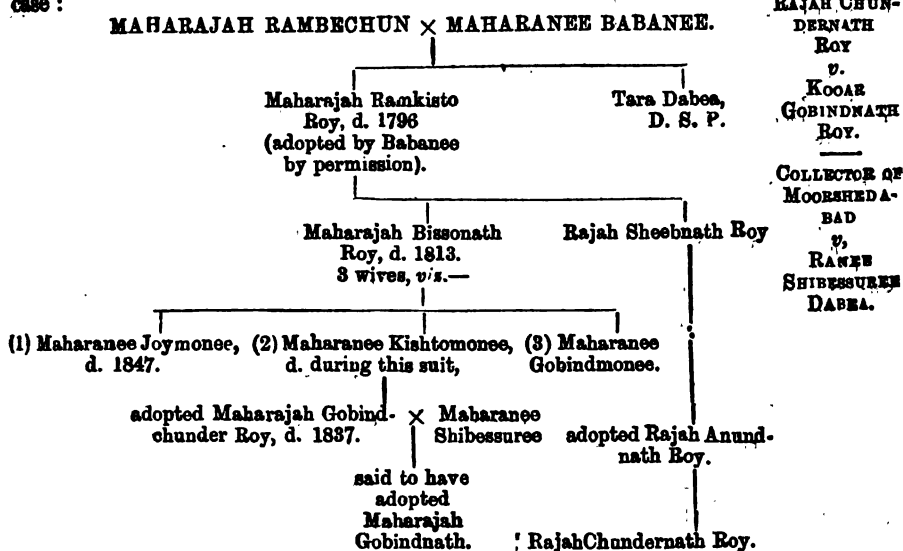
In a suit as to the validity of the adoption of a claimant to the Nattore raj, held, notwithstanding a finding of the Judge of first instance that the adoption was not proved, that the evidence fully supported the adoption.

The presumption is that the object of an endowment by a Hindu for the worship of idols is to preserve the sheba in the family, rather than to confer a benefit on an individual; but if there are in the deed of gift no words denoting an intention of the donor that the gift should belong to the family, that presumption will not arise.

THE history of the litigation out of which these appeals arose is complicated.

* *Present* :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR MONTAGUE E. SMITH, AND SIR ROBERT P. COLLIER.

The following pedigree will assist in understanding the case :



Kasseesoondree Dabee was the widow of one Doorgachunder Roy, who claimed certain property by deed of gift from Joy-monee, and Doorgachunder having died, leaving an infant son, Koylachunder Roy, a minor, his interests were taken charge of by the Courts of Wards.

On the 27th August 1849, Maharanee Kishtomonee filed a plaint against Doorgachunder (by her called Hurnath Roy) and his wife Kasseesoondree, and against Chundernath Roy, in which she, as guardian of Gobindnath Roy, sought to have him declared as the duly adopted son entitled to certain portions of the Nattore estate which had been left in Joy-monee's hands, and which Doorgachunder Roy and his wife had taken possession of claiming to hold the same under gifts from Joy-monee. At that time Gobindnath Roy was in possession of the residue of the Nattore estates, except a small portion in the hands of Anundnath.

The defendants denied Gobindnath's title as the adopted son, and relied on the deeds of gift.

Anundnath Roy intervened, and also disputed the title of Gobindnath.

The suit eventually came up to the Sudder on appeal (1) and was dismissed. A review however was granted (2); and on the

(1) S. D. A., 1857, 1127.

(2) S. D. A., 1857, 1843.

1872 rehearing of the case, it was remanded by an order of the 30th April 1859 (1). On the 27th January 1860, fresh issues were settled by the Judge as to whether Gobindnath was the duly adopted son (if so, he would be Rajah of Nattore), and whether Ranee Joymonee had a right to alienate, and did in fact alienate, the properties claimed by Kasseesoondree and the Court of Wards.

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In February 1860, Anundnath Roy (who would have been the Rajah if Gobindnath were not duly adopted) filed his suit to recover the whole estate, including that claimed under the gifts from Joymonee.

The two cases came on before Mr. L. S. Jackson, who, on the 7th September 1860, in his judgment in the first suit, decided that the adoption was not made out, and dismissed the suit. On the 20th September 1860, he gave judgment in Anundnath's case, whereby he, declaring Anundnath to be the Rajah, gave him a decree for all the property he claimed, save that comprised in two of the five deeds of gift which will be hereafter referred to.

Mr. Jackson's judgment was as follows :—

"The plaintiff Ranee Kishtomonee's case, as detailed in evidence, is that, in the month of Aughran 1243 (December 1836,) Rajah Gobindchunder residing at Nattore, was attacked with fever, which, after he had been ill about a week, took an unfavorable turn. The symptoms which constitute, in the native phraseology, *bikar*, making their appearance, the native physicians in attendance on the night of the 24th announced the Rajah's dangerous state to his *mutasaddi*, or secretary, Hurishchunder Khan, who on this went to the Rajah. That, on the following morning, Hurishchunder Khan was directed by the Rajah to prepare an *anumatipatra* (deed giving power to adopt) and *katrityapatra* (deed giving power to manage) which accordingly were drafted, engrossed on stamped paper, signed, and attested by about 10 o'clock that day; that the *anumatipatra* was at once made over to Ranee Shibessuree by the hand of her father, Hurishpursad Roy, who was then in attendance, and the *katrityapatra* was retained by the Rajah in his box for delivering to Ranee Kishtomonee in person; that after this the Rajah prepared, in anticipation of death, to proceed to the Ganges, and accordingly started the next morning, the 26th, arriving on that evening at Rampore Baulleah,

(1) S. D. A., 1853, 549.

where he halted for the night; that early next morning he crossed the river, after which he had a bleeding at the nose, and got rapidly worse upon the road; that about sunset he reached Sydabad,—on the Bhugirutti (or sacred stream) of the Ganges, not far from Moorshe-dabad, where Ranee Kishtomonee had a house, and where she had been for some time living; that on his being brought into the verandah, the Ranee came down to meet him, and wept over his condition; that he called for his box, took out the deed of appointment, and laid it at his mother's feet, praying her to accept the charge, asking forgiveness for his offences, and her parting benediction, for it is alleged the Ranee was his *guru* or preceptress, as well as adoptive mother; that about 6 *dandas* of night, his dissolution being imminent, he was taken to the river bank, where, about 1½ *bhurs*, or 10 P. M., he expired, calling on the name of 'Gunga.' It is added that, on the morning after he died, the Rajah's seal was broken by command of Ranee Kishtomonee, and in her presence, by Hurishchunder Khan; that, on the day after, she started for Nattore, where the obsequies of the deceased Rajah were celebrated; that about six weeks afterwards, she petitioned the Collector, setting forth the deeds abovementioned, and soliciting that orders might be passed accordingly, and that finally, on the 10th of May, she filed the *katritiyapatra* in the Judge's Court, with a claim to represent the late Rajah in a certain appeal then pending before the Sudder Dewany Adawlut. On the part of Anundnath and of the original defendants, evidence is adduced to show that persons who were in constant attendance in the Rajah's apartments during his last illness, and who must therefore have witnessed the preparation of these documents if genuine, saw nothing of the kind, and confidently assert they could not have been prepared to prove that Hurishchunder Khan, just before the Rajah started from Nattore, importuned him to make some arrangement for adoption in the event of his demise, to which the Rajah replied that he did not think fit to do so, that on the marriage of his daughter, her husband would do all that was needful; that the Rajah, after his arrival at Baulleah, being waited on by one of his agents, informed him that he intended giving authority, but had reserved all writing until he met his mother; that the Rajah's seal, in his box, went and returned from Sydabad in the custody of Deenoo Singh, the jemadar, who kept a vigilant eye upon it; that Ranee Kishtomonee, on her journey through Rampore Baulleah to Nattore, said nothing of the deed in her possession, or of the specific arrangements made by her deceased son; that after her arrival at Nattore, a dispute arose and continued for some time.

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1872 between her and Ranees Shidessuree concerning their respective claims to administration, which controversy was terminated by an arrangement, including the preparation of the two documents."

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After this statement of the facts, the Judge proceeded to comment on the evidence adduced in support of the deeds, and to examine in detail the *status* of the various attesting witnesses, and the credibility of their evidence, and thus summoned up the result of his examination :—

"Compare these witnesses with those who attested the deed of authorization by Rajah Bissonath, under which Rajah Gobinchunder was himself adopted, and mark the contrast. In the one case, independent zemindars, eminent pleaders, men of position and education; in the other, low servants, without an exception either menials, or occupying other inferior posts in the establishment, obscure and ignorant. To support this weak array, the plaintiff relies upon a number of witnesses not attesting, but said to have been present at the making of the deeds.—

After specifying the class of persons who might have been expected to be present on an occasion of such importance, the Judge said :—

"Instead of these or other such persons, there are some few spectators named belonging to that undefinable class in native society called '*bhodrolok*' (respectable people); one or two of these who are now mentioned by the witnesses, for instance, Panchanun Lahory, said to have been a zemindar, and Kally Siromoni, have been dead some time and might therefore be safely named, but among the whole of the persons whom all the witnesses have named as being present, there is not, with the exception of Hurishpursad Roy, one single individual of any real rank or consideration, and as to Hurishpursad Roy, who is a small zemindar living at Amhati, scarcely anything, but the fact of his having been the Rajah's father-in-law, entitles him to be excepted."

After further enumerating the witnesses said to have been present, and pointing out "their general character and title to implicit belief," and showing that it would have been easy and natural to secure the attendance of certain witnesses of position "whose recorded presence would almost exclude the possibility of dispute," but who were absent, he adds :—

"Another thing to be noted is that not only are nearly all the attesting witnesses dead, but so are the persons by whose hands the

documents are said to have been written, but whose signatures in attestation of the fact are not subjoined.

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"The testimony of what are called *mujlisi* (court) witnesses must always be received with caution, particularly when there is no independent proof of their having really been present, and most particularly when the distant date of the transactions in dispute renders positive confutation almost hopeless, and impunity to perjury consequently almost certain.

"I have read over and over again the evidence of these witnesses with that interest which an anxiety to come to a right decision must inspire, and each successive perusal confirms the impression originally made in my mind when the evidence was given before me, viz., that the witnesses were not reciting a single chance page out of the history of their every-day life at that period, but repeating a dressed-up sketch, composed at a much later day."

In stating his reasons for refusing belief to the plaintiff's witnesses, the Judge summed up in this manner :—

"I have already said they are not witnesses of the kind which the occasion demanded, also that their presence there, apart from their being required as witnesses, was unnecessary, unaccounted for, and improbable. I have also noticed that, with the exception of Hurish-parma Roy and of Monmohun Kobberaj; of whom I am not certain, every one of these witnesses, I believe, is now in the pay of Ranee Kishtomonee.

"There has been ample time to arrange the details of all evidence that would be requisite, with the nice shades of difference which various witnesses ought to exhibit. The stake has been large, and the cast so far decisive that any further result must depend upon the matter now recorded. It would be strange, therefore, if the case did not present a certain completeness.

"But to come to a definite issue. The Court is told that the Rajah gave his orders for the preparation of these deeds, about four or six *dawds* of the morning of a December day, and that they had been drafted, copied fair, signed, sealed, executed, witnessed, and one of them actually delivered to Ranee Shibessuree, by one or one and a half *pahars* on that morning, that is to say, by 9 or 10 o'clock.

"This I believe to have been simply impossible. Take the *katriya-bharapampatra* alone. This document, after prefatory matter, first recites the grant of permission to adopt to Ranee Shibessuree; secondly, confers upon Ranee Kishtomonee, in the most comprehensive

1872 terms, the entire control over the son to be adopted during his minority with the right of managing and maintaining his interest in and over every description of property which the Rajah possessed; thirdly, a proviso that on her demise such control and authority was to be vested in Ranee Shibessuree; fourthly, a direction that the estates were to be placed under the management of the Court of Wards, but that after payment of the Government demands the whole profits were to be expended by the Ranee at her discretion; fifthly, a proviso that in any case Ranee Shibessuree was not to receive more than Rs. 200 a month for her personal expenses, the remaining profits being devoted to religious worship, &c.; sixthly, that on the son coming of age, everything should come into his hands; seventhly, reserving from the control of the Court of Wards, certain mehals which the Ranee was to retain for life (after her, the Ranee Shibessuree, the adopted son in succession), the proceeds to be expended for the benefit of the deceased; eighthly, a direction that a mortgage on the said mehals was to be paid off out of the proceeds of the remaining estates under the Court of Wards; ninthly a direction to bestow certain talooks upon his only daughter with a view to her marriage, if the Ranee should think proper, and provision that the said daughter should in the mean time have maintenance; tenthly, a recital of the adjustment with Kasseecomul Chuckerbutty abovementioned, and a declaration that the said adjustment was in the hands of the devisor's wife, and was not to be part of the minor's estate; eleventhly, a grant of certain talooks to his cousins (the Ranee's nephews and grand-nephew) in consideration of their indigence, and the terms thereof; twelfthly, conclusion with a direction to produce this deed as occasion required before the authorities, withholding any power of alienation, and binding Ranee Shibessuree and others to an observance hereof."

The Judge then went on to say that, "from all experience of native habits of business," he was "quite certain that this paper with its twelve clauses, could not have been drafted within the time specified for the complete execution of both," and after commenting on certain "little internal indications" (peculiarities in the handwriting and others) as "tending to show that the document was written by a person acting under the Ranee's direction, and not at the Rajah's dictation," he proceeded to "advert to broader considerations connected with the tenor of the documents themselves, and with the state of affairs then

existing in the Nattore family," comparing the probabilities on both sides in the following passages :

" On the one hand, we have the family instinct of adoption, the relation of son to mother, that of *muntra sishya* (disciple) to *guru*, the fact of the Maharanee's known capacity for business, coupled with Shibessuree's comparative youth and inexperience,—all these are undoubted and tell strongly in favor of the plaintiff.

" On the other hand, we must consider the altered position of the family (looking upon Gobindchunder merely as the zemindar of Nattore, and not as a Hindu generally), the rupture between him and the Ranee, which, after consideration of the whole evidence, I am satisfied was never healed before the rajah's illness. The frightful defamation of his character to which she had resorted, and the bitterness occasioned by his successful suit and ejection of her from the estates : the long cessation of intercourse between them ; the Rajah's unquestioned affection for his wife, who was already the mother of one child by him, and might quite possibly bear another ; the absence of any proof that Ranee Shibessuree was wanting in capacity, and the notorious fact that the old Ranee played into her own kinsfolks' hands, together with his own recollections of the difficulty of getting out him of possession when the proper time was come ; these circumstances, I think, are entitled to equal or nearly equal weight with those alleged for the plaintiff. But beyond all these are the considerations connected with what took place after the alleged execution of those deeds.

" The Rajah is universally represented as a man of superior ability. He was acquainted as well with ordinary business forms as with the usages of his family. I think it incredible that, after having made such dispositions, as he is now represented to have made, he should have passed through the sudder station of his own district without making a communication of any sort to the authorities.

" It would have been neither strange nor unreasonable if he had sought an interview with the Zillah Judge or Collector to communicate verbally a matter of such vital importance to his family. Either of these officers I am sure would willingly have gone to his lodging to receive from him this communication. Or, if indisposed to that step, it would have been simpler still to direct his agent there to present a petition in Court or office notifying the circumstance. This petition might have been signed by the Rajah himself, or by the mooktear under his general power, and must, under the circumstances have been free from all suspicion.

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"It is inconceivable that the Ranee herself, upon the death of Gobindchunder, finding herself in possession of this document, herself a shrewd experienced woman, versed in cases of this sort, surrounded by experienced advisers, should not have immediately made a communication to the Collector or Judge of Moorshedabad with the view of giving the earliest publicity to the Rajah's death and to his dying wishes.

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"It is improbable in the last degree that if, as alleged, she broke up the Rajah's private seal before she left Sydadab, she should not have reported the fact to the local authorities, producing the broken seal in testimony.

"This I look upon as a figment introduced to heighten the picture and to guard beforehand against an hypothesis of the deeds having been subsequently prepared. It may be said the Ranee's distress and the suddenness of the thing prevented her from taking this precaution. I say the thing is inconceivable; Gobindchunder was not her own son; all the Hindoo *shastors* combined cannot raise the ceremony of adoption to a level with the natural tie between a woman and her offspring. The tie of association and education had been broken by material injuries and by the saying of things that can rarely be forgiven; the conjuncture was not new to her and she had time for reflection. The omission is therefore unaccountable.

"The wonder is increased, when we find that she passes through Rampore Baulsah, still without a word to local authorities, or even to any person of note at the sudder station, and that she continues for six weeks absolutely silent on the subject.

"At the end of that time she petitions the Collector. It is by no means clear that she filed the document with that petition, for her subsequent application for its return does not specify it as having been filed with a petition of such a date, and the document itself bears no indications of having been in the Collector's office at all. This may or may not be the practice of that office, there is no evidence on the point, and I think it immaterial. Six weeks in such a case appears to me as serious a delay as six months, for the more unusual, and altogether improbable, the arrangements on the Rajah's part might be the more cogent was the necessity for their publication. And on this point I think the evidence of Harradhun Sanyal deserving of attention. This man is a mooktear of the better class. He has served alternately one or other branch of the Nattore family for some thirty years, and was in the Rajah's service at the period of his death. He declares that he saw the Rajah on his way to Sydadab, and the Ranee on her

way thence to Nattore, and he emphatically repudiates the belief that these documents were then in existence. He had interviews with them both, and spoke to the Rajah on this particular subject."

He concluded by commenting unfavorably on the manner in which Anundnath Roy gave his evidence, and holding that Gobindchunder did not execute the documents of the 25th Aughran 1243 (9th December 1836).

Maharanee Kishtomonee and Gobindnath appealed in both cases ; Anundnath Roy appealed against that part of the decree establishing two of the deeds of gift, and the Court of Wards appealed as to that part which pronounced against the other deeds.

The High Court(Steer and Seton-Karr, JJ.) on the 30th April 1863 reversed the decision as to the adoption, and as to the deeds of gift they pronounced in favor of one only.

The High Court, after going through the evidence, summed up the whole in the following way :—

"The direct evidence is really as good as we can expect, considering the length of time that has elapsed since the Raja's decease. The state of the Rajah's mind and body is conclusively shown to be such as would permit of his attention to business. The signature is that of a man somewhat weak. There is no physical obstacle whatever to the preparation of the deeds within the time specified. The terms and provisions of the larger deeds are not more than could have been drawn out by a sharp man of business acquainted with the property and with the position of the members of the family at such crisis in one night at his master's bidding. The reconciliation of son and mother is just what we might expect, and the disposition of the property, including the various bequests, is not inofficious, and if any one was in reality prejudiced, that person is the widow, who has remained consenting and silent. The early publicity of the deeds before the authorities is a strong argument in their favor, and the delay of Anundnath with his admitted knowledge and his habitual residence within the very precincts of the Nattore rajbaree, as disclosed by the suit regarding the 17 bigahs, is utterly inconsistent with his genuine belief in the fabrication of the document and in the validity of his own claims. The history of the family, the prevalence of adoption in the same, the remarkable ability displayed by the wives of Rajahs in successive generations and the position of the various parties, are all powerful arguments,

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which add weight to the others, and which lead us to place implicit confidence in the two deeds which form the subject of this protracted contest."

The unsuccessful parties then appealed to her Majesty in Council, and the appeals were ordered to be consolidated and heard together.

The matters then stood thus :—Chundernath (Anundnath having died) sought to reverse the decision as to the adoption and as to the one deed of gift : the Collector, as representing the Court of Wards, and Kasseesoondree, sought also to declare the adoption invalid, and to have all the deeds of gift declared valid, while Maharanee Shibessuree Dabea (who had become a plaintiff on the death of Maharanee Kishtomonee) and Brojosoondree Dabea (as the widow of Gobindnath, who had also died) sought to support the decree of the High Court.

As the question of adoption was one with which the Government had comparatively little to do, the committee heard the appeal of Chundernath first.

Mr. *Field*. Q. C., and Mr. *Doyne* for Chundernath.

Sir *R. Palmer*, Q. C., Mr. *Leith*, and Mr. *Peterson* for the Ranees.

Mr. *Forsyth*, Q. C., and Mr. *Merivale* for Government.

The Counsel for the appellant relied on the judgment of the Zillah Judge as being complete and masterly.

Their LORDSHIPS of the Judicial Committee, having heard the arguments of the learned Counsel on the issue as to the adoption, gave the following judgment :—

In these appeals the title to the succession to the large and ancient raj of Nattore, on the death of the Rajah Gobindchunder is involved, and it has been thought convenient to determine it before proceeding to deal with the other questions in the suits.

The issue raised on the title is whether Gobindnath, the respondent, is entitled to the succession as a son by adoption of the late Rajah Gobindchunder: The adoption was made by his widow Shibessuree, and the power to make it is alleged to have

been given by a deed (*anumatipatra*) executed by the late Rajah on the eve of his death. He is alleged to have made at the same time another deed (*katrityapatra*), giving his mother Kishtomonee, or rather his adoptive mother, the management during the infancy ; and the whole question on this issue turns upon the validity or invalidity of these two deeds.

Their Lordships do not think it necessary to go into the history of the long and complicated litigation which has arisen out of this succession, though parts of it may be incidentally referred to ; and the general facts which introduce the period when these deeds were executed are few.

It appears that Gobindchunder died in 1836, having the raj, in full right and possession.

He died, leaving his mother Kishtomonee, his wife, who was then about the age of 20, and an infant daughter about two years old ; and it is material to bear in mind this state of his family in weighing the presumptions which arise from the subsequent conduct of the parties.

The Rajah Gobindchunder had himself been adopted into this family by Kishtomonee in the year 1814, and he came of age in 1829. During his minority, Kishtomonee managed the property, and there were disputes between the Rajah and his adoptive mother, which when he came of age, led to what has been called by the learned Counsel for the appellant exasperated litigation. There can be no doubt that there was fierce litigation between the mother and the adopted son. In that litigation insults were heaped by one upon the other ; and the fair result of the evidence seems to be that they continued for a considerable time in a state of hostility. From conversation held with the Rajah himself, it appeared that, only a short time before his death, he was not on visiting terms with his mother. She had left the palace at Nattore, and had gone to live at Sydabad, on the other side of the Ganges. But, although that state of hostility between mother and son is proved beyond all disputes by the evidence, it is also proved, and with equal certainty to the minds of their Lordships, that on the eve of his death the Rajah became sincerely desirous of seeing his mother, and becoming reconciled with her. He was taken ill some few days

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before the 9th of December. On the 9th of December, or as one witness says, on the day before the 9th, he was told that his illness was serious ; and on the morning of the 9th, when several family physicians were present, when one of his relatives, Hu ishpursad, the father of his young wife, was also present, the evidence is that the deeds which are now in dispute were executed, attested, one by nine, and the other by eleven witnesses, and the deed of adoption (*anumatipatra*) given by the Rajah to Hurishpursad, who at once delivered it to his daughter, the Rajah's wife, who was behind the screen in the same room. The other deed the Rajah put in his seal-box, intending himself to take it to his mother.

The direct evidence of the execution of the deeds is that to which attention should first be called ; and, of course, if that evidence fails to establish that those deeds were executed, the case of the respondent must fail.

Their Lordships, having given very careful consideration to the evidence in this case, have come to the conclusion that the judgment of the High Court is perfectly right ; that there is direct evidence of the execution of the instruments, which is, if not so clear as to remove all doubt, at least so satisfactory that, in the absence of contrary evidence, or very strong presumptions to the contrary, it ought to prevail. Their Lordships also think that, whilst the direct evidence is satisfactory, the presumptions which exist on the one side and on the other, when they come to be weighed, very strongly preponderate in favor of the execution of these deeds. Several witnesses have been called who were present when these deeds were executed ; and in considering the witnesses who were called, and the absence of witnesses, the length of time which had elapsed from the period when the deeds were executed to the time of the inquiry must be borne in mind. The deeds were executed in December 1836, and these witnesses were examined before Mr. Jackson in 1860, 25 years after the event. It is unnecessary to say which of the parties is responsible for the delay. Undoubtedly, when the conduct of Anundnath comes to be considered, there will appear considerable delay on his part ; but without casting the responsibility of that delay on the one side or the other,

the fact of the delay is certainly important when we come to consider the evidence which was given, and that which, if the case had been heard at an earlier period, might have been expected to be given. Of the witnesses who have been called, without adverting to the others, three appear to be in a respectable position in life, and one of them is a witness, whose interest is apparently opposed to the deeds supposed to have been forged, and which he must, if he is saying that which is untrue, be assumed to have assisted in fabricating. This witness, Hurishpursad Roy, was an old man when he was examined, and the father of Shibessurer, the widow of the Rajah. He says he was present when these deeds were executed. He gives a long account of the way in which it was done, and he gives the names of the writers. He says:—"Bhoynub Sircar wrote the *anumatipatra*, and Kistodhone Mozoomdar wrote the *katrityapatra*." Both these persons are dead. He also gives us the name of the officer of the Rajah who drew the will, Hurishchunder Khan, who appears to have been the chief dewan in the Raja's house, and therefore a person very likely to have been consulted. Hurishchunder Khan prepared the deeds and read them over. If this witness is to be believed, Hurishchunder Khan read them over to the Rajah, then they were executed, and one delivered to Hurishpursad himself to be given to his daughter in the way which has been already described. In addition to that witness, there is Needanchunder Roy, a cousin of the Rajah living with him, and therefore a person who would naturally be present upon an occasion of this kind, and Monmohun, the court physician, one of the numerous doctors who were in attendance upon the Rajah. Those witnesses were not subscribing witnesses; and undoubtedly that which is least satisfactory in this part of the case is that these respectable persons were not subscribing witnesses, and that only one subscribing witness was called upon the inquiry in 1860. But it appears that upon a trial which took place before the Principal Sudder Ameen, in the year 1852, two attesting witnesses were called. The deposition of one of them has been read, and the other (to adopt the phrase used at the bar) has in some way dropped out of

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the record. It appears to have been the deposition of one of the physicians. Other witnesses had died before the inquiry in 1860. Therefore, their Lordships find a considerable number of witnesses called to prove the execution of these documents. They do prove them in the most direct way, and if any credit is to be given to their evidence, these deeds were executed by the Rajah, and one of them was delivered by his own hand to Hurishpursad.

On the other side there is no direct evidence, but it is sought to impeach this testimony in favor of the deeds by admissions which were supposed to have been made by the Rajah himself and by his mother the Ranee Kistomonee about the time when it is supposed that these transactions took place. The Rajah himself expressed his desire to be carried to the Ganges to die. His mother lived near the Ganges. In the course of his journey, which apparently was a journey of about 60 miles, he stopped at Rampore, and there he was seen by a witness, Harradhun Sanyal, mooktear, who from his own statement had been employed by several members of this family in transacting their legal business. His evidence appears in the second record, and he is the only witness called by the appellants whose evidence goes very seriously to impeach the testimony as to the execution of the deeds. It is no doubt very important, and is entitled to be very carefully considered, because, undoubtedly, if what he says is taken literally and is true, it is difficult to suppose that the Rajah had executed these two deeds before he had started on his journey. He says he saw the Rajah at Rampore and had conversation with him; and he says:—"I told the Rajah that you are unwell, you give a permission for holding of the house; upon which he told [me], 'I have an intention of giving permission. It is not written. I cannot do so until I see my mother. I will go to the banks of the Ganges. Get a boat for me.' Upon which I told him, 'You present a petition intimating the said permission.' He said, 'Let me go to my mother and I write it. There is no need of giving any information. Get me a boat and cross me over.'"

Undoubtedly, if that evidence is entitled to credit and to be entirely relied on, it is inconsistent with the execution of the

deeds having then taken place. But there are various circumstances which tend to impeach this evidence. Hurradhun Sanyal it appears from his own statement, had quarrelled with Kishtomonee; she had in some way withdrawn her confidence from him, and he admits that he then took part with Rajah Anundnath. But what appears still more to throw doubt upon his evidence is this: he says that, although he had had this all-important conversation with the Rajah, upon the question which must have agitated the family for many years, although he was acting for Anundnath and in constant communication with him, he never told him of this conversation until after the commencement of this suit. That does appear to be utterly incredible, and to throw not only doubt but discredit upon his testimony. It is also to be observed that, even if that testimony be true, and although, if the Rajah is assumed himself to have been sincere, his expressions indicate that the deeds had not been executed, yet it is possible that, as he had not employed this man in preparing them, he might not for that reason or for others have chosen to tell him of what he had done. Again, supposing the evidence to be entitled to any credit, two circumstances appear from it extremely favorable to the case of the respondent; one is that the Rajah had the intention to give the power of adoption to his widow; and the other is that he was going to see his mother; and from his expressions, as given by this witness, it is plain that he was going not only to see but to consult her, and act according to her advice and wishes. Those two circumstances are strongly in favor of the presumptions of intention on which the respondent relies.

A great deal of evidence appears to have been given in the suit before Mr. Jackson, to show that Kishtomonee and Shibers suree had fabricated these deeds, in order to compromise a quarrel between themselves. The learned Counsel, Mr. Field, who very fully and strenuously argued this case, has not ventured to rely upon that evidence. His main support was the judgment of Mr. Jackson, and as Mr. Jackson himself did not believe that story, Mr. Field probably exercised a wise discretion in not relying upon it. But it is perfectly plain that the appellants had set up a case of fabrication of documents,

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which entirely broke down and failed to obtain credit. The endeavour to do so, and in a very systematic way, throws great discredit upon the whole of their case.

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Anundnath himself was examined, and it appears to their Lordships, as it did to the High Court, that his evidence is very strongly in favor of the validity of these deeds, because it appears that he recognised, by the giving of presents, both the adopted children. He recognised the two sons who were in succession adopted; and the only way in which he gets rid of that damaging fact is by saying that he was not aware that they were adopted under a valid power given to the widow. He says he thought they were merely children about the house brought up by Shibessuree: but their Lordships think that such an explanation is entirely incredible. He was living in the palace at the time the Rajah died. These deeds had been publicly notified to the Collector, and had been filed. He must have known of the deeds and of the attesting witnesses to them; and to suppose that this gentleman believed that these children had not been adopted is really impossible. A letter was put in evidence when he was examined, which, if it be genuine, is decisive to show that he treated the first child as the legally adopted son of Gobindchunder. The letter is this:—"Having received the letter conferring blessings, I cannot express the mental agony I feel on hearing the news of the death of my brother's son." Nothing can be more precise than that expression. In the mind of a Hindu, when it was used, it must have been perfectly clear that the child who was just dead could only be his "brother's son" by a legal adoption. There could have been no adoption in this case by the widow, unless by virtue of deeds executed by the Rajah before his death. A question was made whether that letter was really Anundnath's writing or not. The evidence seems to be in favor of its authenticity. Mr. Jackson says he only faintly denies it. He was examined before that Judge, who had an opportunity of seeing him. The other circumstances referred to in the examination go a long way to show that it was a genuine letter. A man would not "faintly deny" such a letter if he could have denied it honestly, and the faintness probably arose from the

feeling that he could not with a safe conscience say that it was not his own letter.

Upon the whole of the evidence, therefore, which their Lordships have considered, but to which it is not necessary to advert in all its parts, their Lordships have come to the conclusion already intimated. But this case has arrived at its present stage, and the litigation has been prolonged, not so much by the result which ought to be drawn from the evidence given on both sides directly applicable to the facts, as from this, that the learned Judge Mr. Jackson, drew from circumstances not given in evidence in the case, and from general knowledge, inferences and presumptions hostile to the direct evidence. It appears to their Lordships that some of those inferences are of a strained character, and some of the presumptions unsound; but the Judges of the High Court, who went very carefully through the evidence, have disposed of those inferences and presumptions to a considerable extent, and have made presumptions from the evidence with which their Lordships are very much disposed to agree.

The main presumption which has been relied on in favor of the appellants against the deeds arises from the state of feeling which existed between his mother Kishtomonee and the Rajah. Undoubtedly that state of feeling is entitled to be considered. It has already been stated that it existed. But there is surely nothing contrary to the ordinary workings of human nature in the supposition that, on the eve of his death, he was desirous of reconciliation, and that an entire revulsion of feeling had come over him. It is said, Why should he entrust the management of this important raj to his mother, who had managed it so much to his own dissatisfaction? It appears that the dissatisfaction was that she preferred to manage it herself, and would not let him have the control of it; and he may have thought that, when he left a young wife and an infant child, the mother, who was so perfectly capable of managing, was the best manager whom he could select. But that he did desire reconciliation and was anxious to consult her is perfectly clear; and that he went out of his way when the hand of death was upon him for the very purpose of seeing and consulting his mother is equally clear.

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The next inference suggested as hostile to the deeds arose from their non-publication by the Rajah before his death, or by Kistomonee immediately afterwards. Unquestionably it is most satisfactory when documents of this kind are registered, and it would be very much for the interest of proprietors in India if, when they execute deeds giving their widows after their death power to adopt, they would take the precaution to register the deeds (1). It might save great litigation, which very frequently wastes the property they desire to preserve. However, it was not done in this case; it was not compulsory on the Rajah to do it; and the time when these deeds were executed, the circumstances under which they were executed, the fact that the transaction was not fully completed until he had taken the deed of management to his mother, and she had accepted the trust, may all account for his not having published them before his death.

Then it is said, Why did not Kistomonee, who, when passing through Rampore, saw some of the old retainers of the family, tell them, and proclaim that she had the management? It would have been better perhaps that she should have done so; but still the delay in publishing the deeds was not very great. About six weeks after the death of the Rajah, she presented a petition to the Collector, in which the two deeds are referred to, and the evidence appears to be that they were then produced to the Collector. At all events, whether produced or not, they were specifically referred to, and in the following June, six months after, were regularly filed.

Again it is said, and an inference is attempted to be drawn hostile to the respondent from the circumstance that the adoption of a son did not take place until six or seven years after the Rajah's death. That appears to be explained and accounted for by the circumstance that the Rajah had left a daughter. If she had lived and had married and given birth to a son, that son would have become the representative of the family; he would have been able to have performed the religious rites of the family and of the Rajah, although not to the same full degree that an adopted son might have done; still

(1) See Act IX of 1871, s. 17,

those circumstances would reasonably account for the adoption not having taken place. Mr. Doyne forcibly pointed out the obligation upon the widow to act upon the power given to her by her husband as speedily as possible, and its great importance as a religious duty. The widow may have neglected her duty, but the presumption against the deeds does not seem very strong from that circumstance; whereas the presumption that the Rajah would leave the power to adopt is very great. The stronger the duty to adopt a son, the stronger is the presumption that the Rajah would not like to die without leaving power to his widow to make the adoption. That he should have postponed it to the eve of his death is a circumstance that does not weigh against the probability of the deeds, for he was only of the age of 24 or 25, having a wife younger than himself.

These seem to be the presumptions which have been most relied on against the deeds, but the presumptions in favor of them are not only strong but almost irresistible.

The theory of the appellants must be that these deeds are forgeries, and if they are forgeries, Shibessuree and her father Hurishpursad must have been engaged in them. It was clearly against the interest of the widow that there should be an adoption, for she would have been entitled to the raj and all the property for life, and her daughter, if she had married and had had a son, would have continued the succession. And her father certainly could have had no interest in fabricating a deed which would give Kishtomonee the management, because if such a deed had not existed, and his daughter had had her life-estate in the property, he would have been the natural person, as her protector, to have had the management of it. Therefore the presumption against forgery, arising from the interest of these two persons who are supposed to be implicated in the fabrication of the deeds, is very strong.

Then there is the presumption to which allusion has been already made, arising from the duty to have a son by birth or adoption, strengthened by the presumption arising from the usage in this family, in which for 150 years, with only one exception, there has been a series of adopted children. It is very unlikely that the late Rajah should have wished to drop

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that usage. At all events there is a strong probability that he should have desired to act in accordance not only with the general law, but with the custom of his own family.

The last presumption to which their Lordships think it necessary to refer is that arising from the conduct of Anundnath himself. It was been already incidentally adverted to, but is so strong that their Lordships desire again to direct attention to it at the close of their observations. Anundnath was a man apparently of wealth and position. He recognized the two children who were adopted in succession, and it is not until the year 1849 that he first comes forward, not directly to put forward his claim, but to intervene in another suit which had been brought by Kishtomonee, on behalf of the adopted son, to recover some property from third persons. It would appear from the proceedings which took place before the Principal Sudder Ameen, in which it is now said that the validity of these deeds was in question, that, if that was so, Anundnath brought forward then no witnesses to impeach them, and certainly did not put forward Haradhun Sanyal, the mooktear, now his strongest witness. It seems that that proceeding, which was a suit to recover property belonging to the raj, took this course ; evidence having been given of the execution of these deeds by one or two witnesses, and no evidence having been called on the other side, it was supposed that enough had been done to establish the title. That may have been a misapprehension. It may have been that the Sudder Dewanny Adawlut were right in their first judgment in thinking that the matter was fully in issue, and that if that were so, sufficient evidence had not been given to establish the validity of the deeds. It certainly looks as if the case had proceeded very much in the way in which an ejectment proceeds in this country, where an heir brings an ejectment to recover possession from a stranger of property belonging to his estate, he introduces a *primâ facie* case, and unless there is evidence given on the other side, it is considered to be sufficient. However that may be, the Sudder Dewanny Adawlut upon review considered that there had been a misapprehension ; that there was an issue which had not been properly tried, and so they sent the case down again.

It is important to observe that, upon that first inquiry, the trial was either treated as one where *prima facie* evidence was sufficient, or if it was treated as one where both parties were to bring forward all their evidence, Anundnath did not bring forward any ; and certainly did not bring forward the mooktear on whom he now so strongly relies.

Their Lordships having come to the conclusion that the judgment of the High Court on the question of succession is right that decision will dispose of the two appeals of Rajah Chundernath Roy. They will therefore advise Her Majesty to dismiss those appeals with costs. They will also advise Her Majesty wholly to affirm the decree of the High Court made on appeal in the suit originally brought by Anundnath Roy, No. 28 of 1861, and also to affirm the decree of the High Court made on appeal in the suit originally instituted by Kishtomonee Dabea against the Collector of Moorsshedabad and others in 1849, in which Anundnath Roy intervened, so far as the question of succession is concerned.

Their LORDSHIPS then proceeded to hear the arguments as to the validity of the deeds of gift which were the principal questions raised by the appeal of the Government.

The deeds in question were five in number, and were executed by Maharanee Babanee in favor of Ranee Joymonee Dabea. It was admitted that Ranee Joymonee had given the properties to Doorgachunder and his wife.

The deeds were as follows :—

Deed No. 1.

TO THE TO-BE-REMEMBERED RANEE JOYMONÉE DABEA.

“This *hibanamah* (deed of gift) is executed in the year 1205 (1798). I have certain property for the service of the gods worshipped by me at Mamoodpore, Kallie Baree, and Gopaulpore, appertaining to Chukla Bhoolsleah, within the jurisdiction of the district of Jessore. I have now arrived at my old age, and am desirous of visiting holy places. My eldest grandson is Rajah Bissonath Roy. His understanding is unsettled. He is incapable of managing the property, and the seminary in his name is gradually diminishing. My second grandson,

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1872 Kooar Sheebnath Roy, is a minor and disobedient to my commands. Therefore, by neither of these two can the service of the gods be performed. Knowing this, you are the wife of my grandson and mother of a son; moreover, you are always employed in taking care of me, you will be able to conduct in a very good way the service of the gods, and my property will remain intact. For these reasons, the worship of the aforesaid gods and their *debutter* *pergunnahs* (naming them) and all and every land with the *thacurbari* in the said places, the tanks, ponds, gardens, the ornaments of the gods, and the utensils and furniture, and all the property appropriated to the worship of the gods, I make over to you by a gift, in my sound senses. Having caused your name to be enrolled in the *shebaitti* (management of the *sheba* or worship), you will take possession of the *debutter*, &c., and continue to perform the prescribed worship of the gods from generation to generation. You have the power to appoint a *shebait* for the worship of the gods. I and my heirs have no concern with it. For this reason I have given this deed of gift, dated 25th Kartick 1205 B. S." (8th November 1798.

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Deed No. 2.

TO THE TO-BE-REMEMBERED RANEE JOYMONEE DABEA.

"This is the deed of *hibanamah*, year 1209 (1802). Deed of gift to the effect that my auction-purchased zemindary Hoodda Burranagor and others, I in sound mind, of my own free-will, having abandoned my own interest, make a gift of it to you. By paying the *malguzari* into the sudder, you will do virtuous actions, &c., from the profits. As long as I shall live, the said *hoodda* should remain in my name. After my death, you, by entering your name in the sudder, and striking out my name, and by recording your name in Zillah Moorshedabad Collectorate, you should enjoy it with your son and grandson, i.e., in succession. If at any time any heir of mine should make any claim, that will be null and void. To this effect I execute the deed of *hiba*, dated 5th Srabun 1209 R. S." (19th July 1802).

Deed No. 3.

TO THE TO-BE-REMEMBERED RANEE JOYMONEE DABEA.

"I have in my Burranagore house the worship of the Idol Sree Sree Ishwur. My daughter was the *shebait*. On her death I worship at present. I am incapacitated now. For the purposes of worship, there is Turrup Benuudnugger, &c., and Beel Ekumba Talook, as also Debutter

Goopenathpore, &c., and in Pergunnah Sherpoor the *chuck* and gardens in Turrup Burranagore, and all the ornaments of the gods, as also the furniture which is theirs: I give it to you as a gift. You will take possession in accordance to the *hiba*. You will always perform the worship of the gods: if you fail, the virtue or the sin be on you. With me there is no connection. You will cause yur name to be written in the talooks as *shabait* (worshipper in the Government records, and will always pay the revenue. Therefore I give this deed of gift, the 29th Srahun 1209 B. S." (12th August 1802).

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Deed No 4.

TO THE TO BE-REMEMBERED RANEE JOYMONEE DABEA.

"Deed of gift written in the year 1209 (1802): may it come of use. In Barranagore the *Rajdhani* house, and the *mohul* tank and mangoe garden and jack and other fruit trees, &c., and the buildings of masonry, &c., the whole I give, of my own free-will, as a gift to you. You will repair the house and garden, and bring it into your possession and hold possession and have enjoyment in peace. You have the power to make gift, or to sell it; it has no connection with me. If hereafter any of my heirs lay any claim, it is void. Therefore I give the deed of gift, the 12th Bhadro of the above year" (27th August 1802).

Deed No. 5.

TO THE TO BE-REMEMBERED RANEE JOYMONEE DABEA

"This *hibanamah*, or deed of gift, executed in the year 1209 (1802), is to the following effect:—The *sheba* (worship) of Sree Sree Doorga is mine: of that *sheba*, I had a desire to make a gift to my daughter-in-law, Ranee Sunkary. In the year 1206 (1799); for arrears due from Rajah Bissonath Roy, *bokras*, &c., were sold by auction. At that time I purchased it, paying the value through Rooddra Chowdhry in the name of the goddess. I got it once registered in the name of Ranee Sunkary. She is dead. For this reason I make a gift of the same *sheba* to you, who are my granddaughter-in-law, of the entire talook Turrup Kajepore, Bhabany-poor, Doorgapoor, Anondopore, Bokra, Sahary, Habaspore, Soboral, and Tarapore, and the Debutter Fazilnagore Koomary, Pergunnah Korarprotass, Goysabad, Noyangur, Dhawal Bonehaut, Goucur, Kalsoena, and Rajshahye; the *debutter* gardens at Burranagore, consisting of betel-nut, cocoa-nut, mangoe, jack, and other trees; cows and buffaloes;

1872 and the ornaments, &c., of the goddess and all the *sheba*. You will have your name registered as a *sheba* (manager of the worship), and take possession of the mehals through your men, and continue to perform the worship of the gods from son to grandson, and so on. For this reason I give this deed of gift, dated 22nd Bhadro, in the year aforesaid" (6th Septemeber 1802.

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Sir. R. Palmer, Q.C., Mr. Leith, and Mr. Peterson for the Ranees.

Mr. Field, Q.C., and Mr. Doyme for Rajah Chundernath Roy.

The following cases were cited:—*Sonatun Bysack v. Sreemutty Juggutsoondree Dossee* (1), *Ram Sundar Roy v. Heirs of Rajah Udwant Sing* (2), *Elder Widow of Raja Chutter Sein v. Younger Widow* (3), *Bhowanee Purshad Chowdree v. Rane Jugudumbha* (4), *Ranee Shibeshuree Debia v. Mothooranath Acharjee* (5), and *Juggurnath Roy Chowdhry v. Kishen Pershad Surmah* (6).

Their LORDSHIPS having taken time to consider, delivered the following judgment:—

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The remaning question in the appeal in the above suit relates to the effect to be given to four out of five *hibanamahs* executed by the Maharanee Babanee in favor of Joymonee, one of the wives of her grandson Bissonath Roy. The appellants contend that, although Gobindnath has established his title as heir by adoption to Bissonath and to the raj of 'Nattor, the properties comprised in these deeds did not descend upon him, because, as they allege, Joymonee acquired under them an alienable estate. It is admitted that in point of fact Joymonee in her lifetime gave the properties comprised in four of the above deeds to Doorgachunder, who has since died, and is represented by Koylaschunder Roy, the minor appellant, and the

(1) 8 Moore's I. A., 66.

(2) 5 Sel. Rep., 210.

(3) 1 Sel. Rep., 180.

(4) 4 Sel. Rep., 343.

(5) 5 W. R., 202.

(6) 7 W. R., 266.

property comprised in one deed to his wife Kaseesoondree, the other appellant. The question is whether Joymonee had power to make these alienations.

A decision hostile to the validity of an adoption of Doorgachunder by Joymonee, under an alleged authority from her deceased husband Bissonath Roy, was given in the course of the protracted litigation referred to in the record: so that he must be regarded as a stranger to the family of her husband Bissonath.

Maharanee Babanee, in consequence of minorities, managed for many years the raj of Nattore, but the property comprised in the deeds in question was acquired by her in her own right. Some part of it, once forming part of the estates of the raj, was purchased by her at auction-sales, when it was sold for the debts of Bissonath Roy. The respondents indeed do not dispute that the property was held by the Maharanee Babanee as her *stridhan*, nor her power of dealing with it as she chose; but their contention is that she dedicated it to religious worship in such a manner that it became inalienable by Joymonee, and descendible only to her heirs. There is no sufficient evidence that the idols mentioned in the deeds were ancestral or family idols, or that the property, before the Maharanee acquired it, was devoted to religious purposes. The dedication to such uses, whatever may be the nature and extent of it, appears to have been made for the first time by herself, and she must be considered as the founder of the endowments.

With regard to one of the deeds (No. 4), dated 27th August 1802, no question arises. It contains no reference to worship, and has an express power of alienation. The Courts in India have concurred, and as their Lordships think rightly, in treating it as an absolute gift of the property to Joymonee with all the rights of unrestricted ownership.

Their Lordships consider also that little difficulty arises with respect to another of the deeds (No. 2), dated 19th July 1802, relating to the "auction purchased zemindary, Hooda Burrangore." That *hibanamah* contains an absolute gift of the estate to Joymonee; and the words "you will do virtuous actions, &c., from the profits," do not appear to their Lordships to contain

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any specific direction or trust capable of being enforced. They appear to be simply recommendatory of a moral duty, and do not qualify the absolute character of the gift. The clause "you shall enjoy it with your sons and grandsons; if at any time any heir of mine should make any claim, that will be null and void," ought not in their Lordships' view to be construed as a limitation to the sons, and consequently as a restraint on alienation. It may have been added to express the absolute and irrevocable nature of the gift. The High Court considered that the absence of an express power of alienation led to the presumption that the gift was limited; and, apparently disregarding their own rule that each deed should be interpreted by itself, they infer from the insertion of such a power in the subsequent deed (No. 4), and the omission of it in this an intention to restrain alienation. Their Lordships think that the subsequent deed cannot properly be referred to for this purpose. If it had appeared expressly, or by reasonable implication from the contents of the deeds that they all formed part of one entire design, then the construction of any one could properly be aided by the dispositions made, and the language found in the others, but it cannot be inferred from these deeds that they are parts of one design, or that they form a connected series to be construed as a whole. Their Lordships consider that this *hibanamah* No. 2, construed by itself, contains an absolute and unrestricted gift of the property comprised in it to Joymonee, and consequently that the judgments given by the Courts in India in favor of the respondents, on the ground that she had no power to alienate, cannot be sustained.

The three other deeds, No. 1, No. 3, and No. 5, are different in their character from the two hitherto discussed. They contain provisions for the endowment and support of idols and their worship, which are in the nature of trusts impressed on the property to be performed by the donee. In the case of a bare trust, leaving no beneficial enjoyment to the donee, there would be strong ground for the implication that the property was not alienable, and was to descend to the donee's heirs as trustees in succession. But it was contended that in these grants the trust is coupled with an interest, giving the donee a right to the enjoyment of the surplus usufruct of the property, after making

due provision for the sustentation of the idols and their worship, and therefore that there is a beneficial ownership capable of alienation. The case of *Sonatun Bysack v. Sremutty Juggutsoondree Doosce* (1) was cited to show that such a beneficial interest may exist as a secular right in property dedicated primarily to the worship of idols. In that case, it is true, a disposition of the surplus was expressly made by the will of the donor; but their Lordships do not doubt that cases may occur where, from the nature and terms of the gift, the intention of the donor to confer a beneficial and alienable interest in property so dedicated may be inferred. The question arising for decision on these several deeds is whether it can be collected from their language that the donor Maharanee Babanee intended to make such a gift, or whether she meant that the worship and the endowments should remain in the family of Joymonee.

It would unquestionably be more consonant with the genius and spirit of Hindu law and usages that endowments of this kind should be made to a family, by whose members in succession the worship might be performed, than to an individual who might sell or give them to a stranger.

The following cases were referred to on this subject during the argument :—*Elder Widow of Raja Chutter Sein v. Younger Widow* (2), *Bhowanee Pershad Chowdree v. Ranees Jugudumbha* (3), *Ram Sundar Roy v. Heirs of Rajah Udwant Singh* (4), *Ranees Shibeshuree Debia v. Mothooranath Acharjee* (5), and *Jaggurnath Roy Chowdhry v. Kishen Pershad Surmah* (6).

There is considerable difficulty in arriving at the intention of the donor in the present case, in consequence of the peculiar position of this family, and the vague and varying language of the several grants. The raj of Nattore was from its nature an impartible estate, descending on a single heir; and the Maharanee certainly does not seem to have intended to annex this property and worship to the raj. She clearly also did not desire that they should go to her grandsons, Bissonath Roy and Sheebnath Roy. It may be inferred from the *hibanamahs* that

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(1) 5 Moore's I. A., 66.

(2) 1 Sel. Rep., 180.

(3) 4 Sel. Rep., 343.

(4) 5 Sel. Rep., 210.

(5) 5 W. R., 202.

(6) 7 W. R., 266.

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she intended one of two things : either to make an absolute gift to Joymonee, giving her full dominion over the property and worship ; or to vest them in her and her heirs, as family property and *sheba* in such manner that the succession should be to her heirs, passing over her husband Bissonath and his brother. It is important to observe that Joymonee at the time of these deeds was the mother of two sons.

Bearing in mind, whilst construing these *hibanamahs*, the presumption already adverted to that endowments of this nature are usually made by Hindus with the object of preserving the *sheba* in families, rather than of conferring a benefit on individuals, their Lordships have been led to the conclusion, with regard to the *hibanamah* No. 1 that, upon the right construction of that deed, Joymonee had no power to alienate the property contained in it. In that *hibanamah* dated 8th November 1798, the Maharanee Babanee says :—" I have certain property for the service of the gods worshipped by me at Mamoodpore, &c. * * My eldest grandson is Rajah Bissonath Roy ; his understanding is unsettled, he is incapable of managing the property, and the zemindary in his hands is gradually diminishing. My second grandson, Kooar Sheebnath Roy, is a minor, and disobedient to my commands ; by neither of these two can the service of the gods be performed." She thus declares her motive for desiring to exclude her immediate heirs, but that motive does not afford a reason for a desire to allow the *sheba* to go entirely out of her family. The deed goes on :—"Knowing you are the wife of my grandson and the mother of a son ; moreover, you are always employed in taking care of me, you will be able to take care in a very good way of the service of the gods, and my property will remain intact." The above passages which refer to Joy-monee being the mother of a son, and to her ability to take care of the service of the gods, and the conclusion the Maharanee draws from these facts, seem strongly to indicate an intention "that the property should remain intact" in the family. The deed goes on :—" For these reasons the worship of the aforesaid gods, and their *debutter* pergunnaahs (naming them,) the ornaments of the gods, and all the property appropriated to the worship of the gods, I make over to you, by a gift.

Having caused your name to be enrolled in the *shebaitti*, you will take possession of the *debutter*, &c., and continue to perform the prescribed worship of the gods from generation to generation. You have the power to appoint a *shebait* for the worship of the gods." The power to appoint a *shebait* is perhaps consistent with either construction. The words "from generation to generation" may, in some cases, mean no more than to express the absolute character of the gift; but, considering the subject-matter, it seems more probable that in this deed they were used in their natural sense to denote an intention to perpetuate the worship in the family. The words "I and my heirs have no concern with it" were strongly relied on by the learned Counsel for the appellant, and they undoubtedly favor his construction; but their Lordships consider, although not without some doubt that those words may be satisfied by referring them to the intention of the Maharanee to exclude her grandsons, who were her immediate heirs, and that they are not sufficient to rebut the construction derivable from the other parts of the document. The judgment on this deed will therefore be in accordance with the decision of both the Courts in India.

Their Lordships have come to an opposite conclusion with respect to the *hibanamah* (No. 3), dated the 12th August 1802. It contains no words of succession, nor any reference to family or descendants. In it the Maharanee says she has in her Buranagore house the worship of the idol Sree Sree Ishwur, that her daughter was *shebait*. "I worship now." She goes on:—"For the purpose of worship there is *turrup*, &c., and the ornaments, &c., I give it to you as a gift; you will take possession in accordance with the *hiba*; you will always perform the worship of the gods; you will cause your name to be written as *shebait* in the Government records, and will always pay the revenue. Therefore I give this deed of gift." No words occur to limit the completeness of the gift to Joymonee, subject to her making due provision for the worship of the idol. It may be that the Maharanee Babanee intended that Joymonee should enjoy this property and worship as fully and in the same manner as she herself had held them; and their Lordships do not consider the presumption already referred to

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1872 arising from general Hindu usages is sufficient of itself, in the absence of any language denoting the intention of the donor that the gift should belong to the family, to impress that construction upon it. Their Lordships, therefore, with regard to this deed (No. 3) disagree with the judgment of the High Court, which reversed the decision of the first Judge (Mr. L. Jackson).

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The construction of the last deed (No. 5), dated 5th September 1802, depends very much on the same considerations and reasons as those which determine, in their Lordships' view, that of the *hibanamah* No. 1. These deeds are substantially to the same effect. The Maharanee in the last says :—" The *sheba* of Sree Sree Doorga is mine ; of that *sheba* I had a desire to make a gift to a daughter-in-law, Ranee Sunkary." She then refers to having purchased property sold for arrears due from Bissanath, and paid the value in the name of the goddess, and to the death of Sunkary, and then goes on :—" For this reason I make a gift of the same *sheba* to you (Joymonee), who are my granddaughter-in-law, of the entire talook, *turrup*, &c., and the ornaments of the goddess, and all the *sheba*. You will have your name registered as *shebait*, and take possession of the mehals through your men, and continue to perform the worship of the gods from son to grandson, and so on. For this reason I give this deed of gift." Their Lordships do not think it necessary to repeat the reasons already given in commenting upon the first deed, which led them to the conclusion that the Maharanee intended that the endowments and worship should remain in the family of Joymonee. They think the declaration of the donor that the worship should continue "from son to grandson, and so on," and that for that reason she made the gift, construed with the aid of the presumption arising from the nature of it, sufficiently indicates this intention. Their Lordships must therefore hold, in accordance with the judgments of both the Courts below, that the alienation made by Joymonee of the property comprised in this last deed cannot be supported.

It was not disputed, in the end, that the respondent Gobindnath Roy, having established his title as heir by adoption to

Bissonath Roy, became also heir to Joymonee, and entitled to recover such of the properties comprised in the *hibanamah* as should be held to be inalienable by her.

In the result their Lordships will humbly advise Her Majesty in the appeal of the Collector of Moorshedabad in the suit originally brought by Kishtomonee Dabee in 1849 as follows, that is to say, that, with respect to the properties comprised in the *hibanamahs* Nos. 1 and 5, the appeal be dismissed, and the judgments of the Courts below affirmed; that with respect to the property in the *hibanamah* No. 2, the appeal be allowed, and the judgments of both the Courts below reversed, and the suit so far as it relates to this property dismissed; and that, with respect to the property in the *hibanamah* No. 3 the appeal be allowed and the judgment of the High Court reversed, and that of the Judge of Rajshahye affirmed.

The parties to the last-mentioned appeal will bear their own costs of that appeal; and their costs in the Courts in India should be apportioned according to the course of those Courts in cases where the plaintiff is only partially successful.

Decrees varied.

Agent for Chundernath : Mr. Wilson.

Agents for the Ranees ; Messrs. Ranken, Ford, Longbourne, and Longbourne.

Agents for Government : Messrs. Lawford and Waterhouse.

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APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Glover.

MAHOMED USHRUF (DEFENDANT) v. BROJESSUREE DOSSEE
(PLAINTIFF).*

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April 17, & 19.

Hindu Law—Alienation by Hindu Widow—Legal Necessity—Performance of Husband's Sradh at Gya.

The performance by a widow of her husband's *sradh* at Gya is a reasonable necessity for which she may alienate at least a portion of his estate.

THE plaintiff in this case was a purchaser from the reversionary heir of one Muddun Mohun Sein, and in that capacity sued to recover possession of three small plots of land belonging to Muddun Mohun's estate.

The defendant claimed by purchase from an original purchaser from Hurripria, the widow of Muddun Mohun, and alleged that the widow had sold for purposes which the Hindu law allowed, viz., payment of her husband's debts, performance of his *sradh* at Gya and the marriage of his daughter. The date of the sale by Hurripria was 19th Sawun 1254 (3rd August 1847), and she died on the 3rd Assur 1266 (16th June 1860).

The Munsif held that there was no proof of any necessity, and no proof that the land was sold either for Muddun Mohun's debts, or for his daughter's marriage. He did not consider the performance of the Gya *sradh* to be a necessity justifying a sale.

On appeal the Subordinate Judge upheld the judgment of the lower Court on the grounds that it was not proved that the land in question had been sold either for the payment of the debts of Muddun Mohun, or to defray the expences of his daughters marriage, but he refused to consider the question

* Special Appeals, Nos. 958, 959, and 960 of 1872, from the decrees of the Subordinate Judge of Sylhet, dated the 1st April 1872, modifying the decrees of the Munsif of that district, dated, the 23rd January 1871.

whether the performance by a Hindu widow of her husband's *sradh* at Gya was a necessity which would allow her to sell a portion of her husband's estate.

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The defendant appealed to the High Court.

Baboos *Srinath Dass* and *Girish Chunder Ghose* for the appellant.

Baboo *Bama Churn Bannerjee* for the respondent.

Baboo *Srinath Dass*.—The performance of the husband's *sradh* at Gya is an expense allowed by Hindu law. If the widow has done any thing for the benefit of her husband's soul, the reversioner cannot dispute it.

Baboo *Bama Churn Bonnerjee*.—A pilgrimage to Benares has been held to be not a legal necessity—*Huru Mohun Audhikaree v. Sreemutty Auluck Monee Dassee* (1). A pilgrimage to Gya is not contemplated by the writers on Hindu law.

Baboo *Srinath Dass* in reply.

Cur. adv. vult

The judgment of the Court was delivered by

GLOVER, J. (after shortly stating the facts).—The point taken before us in special appeal is that the Subordinate Judge did not take into consideration the question whether or not the widow went to Gya to perform her husband's *sradh*, and whether there was a sufficient necessity according to Hindu law for her selling property to enable her to do so. The appellant also objected that the Subordinate Judge had given no opinion as to the "necessity" of the Gya *sradh*.

I do not, I confess, see much probability of the special appellant gaining anything by a remand, but at the same time I think he has a right to ask it. The Subordinate Judge has decided that there was no proof of Muddun Mohun's having left debts, nor that the marriage expense of his daughter required

(1) 1 W. R., 252.

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the sacrifice of his landed property, but he has not found on the other alleged necessity, *viz.*, the Gya *sradh*.

Now, according to hindu ideas. the performance of a deceased husband's *sradh* at Gya would be a very proper and reasonable necessity, inasmuch as the soul of the deceased is supposed to be greatly benefited thereby. Such a pilgrimage would undoubtedly be a religious purpose supposed to conduce to the spritual welfare of her husband, which would give a widow a larger power of disposition than she would ordinarily have, *The Collector of Masulipatam v. Cavalry Venkata Narainapah* (1) : but I do not understand that the *sradh* pilgrimage to Gya can be put any higher than a very necessary and meritorious performance. A widow ought, perhaps, to perform it, but she is not absolutely bound to do so ; it is, I should say, one of those ceremonies for the due performances which a widow might fairly and properly alienate a moderate portion of her late husband's estate, but that she would not be justified in disposing of the entire property for that object ; *Vyavashta Darpana*, vol. I, 63.

The subordinate Judge must decide therefore on the evidence whether the defendant has proved that there was any necessity for selling these three plots of land, for the purpose of providing funds for the Gya *sradh*, which would no doubt involve the question whether Muddun Mohun left other property, from the income of which the pilgrimage in question might have been performed without selling the landed estate. My own impression, after reading the subordinate Judge's judgment, is that he found that there was such an income, but the wording is not I admit very clear.

It has been said that the defendant will have great difficulty at this distance of time in proving what is necessary. No doubt, he will have great difficulty ; and so far as I have seen the evidence, I doubt whether any decision on this point could be come to. But the defendant is himself to blame : it is clear from his written statement that he knew what he had to prove ; and, if his witnesses do not in the opinion of the Subordinate Judge prove it, he cannot complain if his judgment is against him. All purchasers

(1) 8 Mooer's L. A., 529.

from a Hindu widow know, or ought to know, by this time, the extreme risk of such a transaction ; and if they choose to run it, and to buy without consulting the next heirs, or without taking such further steps as would enable them at some future time, should necessity arise, to prove that they made diligent and careful enquiry as to the existence of a legal necessity before buying, they must take the consequences. The defendant here is rather in a worse position, as he is a purchaser from the original buyer. However, if he considers that there is sufficient evidence in the record to enable the Subordinate Judge to decide that there was no income from Muddun Mohun's estate, and that the only way for the widow to perform the *Gya sradh* was to sell the land, he is entitled to ask for a remand for the purpose of supplying the omission.

If the Subordinate Judge considers that, in respect of any of the three plots there is evidence sufficient, he will dismiss the plaintiff's claim, so far it being I consider a reasonable necessity according to Hindu law that a widow should perform her husband's *Gya sradh* if circumstances render it practicable, and that she may for this purpose alienate at least a portion of his estate.

Costs will follow the result.

Case remanded.

Before Sir Richard Couch, Kt., Chief Justice. Mr. Justice Phear, and Mr. Justice Ainslie.

BISSESSUR LALL SAHOO AND ANOTHER (PLAINTIFFS) v. RAM
TUHUL SINGH AND OTHERS (DEFENDANTS).*

Execution of Decree—Revenue Sale set aside—Refund of Purchase-money.

In execution of a decree, A the decree-holder caused the right, title, and interest of B, the judgment-debtor, in certain surplus proceeds of revenue sale then in the hands of the Collector to be sold, and C became the purchaser thereof. On confirmation of the judicial sale, A took out from the Court a portion of the amount paid by C, in satisfaction of his decree. The balance was taken out by other decree-holders in satisfaction of their decrees against B. B instituted a suit for,

* Regular Appeal, No. 139, from a decree of the Subordinate Judge of Tirhoot, dated the 27th May 1872.

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See also
15 B L R 209.
1 L R 1 Cal.
55,

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and obtained a decree, setting aside the revenue sale. *C.* applied to the Collector for payment to him of the surplus proceeds of the revenue sale, but was refused on the ground that the sale had been set aside. In a suit brought by *C.* against *A.* and *B.* for recovery of the amount paid by him for the purchase of the surplus proceeds of the revenue sale :

Held that *B.* was liable to refund the amount and interest.

Sewdamini Chowdrain v. Krishna Kishor Poddar (1) distinguished.

SHEWPEERSAUD Sookul, a decree-holder, in order to realize the amount due under his decree from Ramtuhul Singh, one of the registered proprietors of Mehal Muleck, Alipore, Boozurg, in Pergunnah Balaguch, caused the right, title, and interest of the judgment-debtor in the surplus proceeds of sale of the said mehal (which had been sold for arrears of revenue), viz., Rs. 1,39,693, held in deposit by the Collector in names of the said Ramtuhul Singh and his co-sharers, to be attached and sold on the 18th February 1868. Baboo Bissessur Lall Sahoo and Sodisht Lall Sahoo purchased the same in the name of Juldhari Pandah for Rs. 8,000. After confirmation of the sale, a certificate of sale was with the consent of Juldhari granted to Bissessur Lall Sahoo and Sodisht Lall. Out of the Rs. 8,000 paid into Court by the purchasers, a sum of Rs. 4,970-9-3½ was drawn out by Shewpersaud Sookul on account of the amount due under the decree for which the sale was effected ; another sum of Rs. 407-7-9 was taken by him on account of money due under another decree, and the remainder by other parties who held decrees against Ramtuhul in satisfaction of their respective decrees. Bissessur Lall and Soodisht Lall applied to the Collector to make over to them the sum of Rs. 35,520-14, the share of Ramtuhul out of the deposit in the Collectorate. The Collector rejected the application on the ground that the revenue sale of the mehal had been set aside by the High Court. That decision of the High Court is now under appeal to the Privy Council.

Bissessur Lall Sahoo and Soodisht Lall brought the present suit against Ramtuhul Singh, the judgment-debtor, Baijnath Sookul, the representative of Shewpersaud Sookul, the decree-holder, at whose instance the property was sold, and Ram

Bhurose Singh, Bhoopnarain Singh and others, who in execution of their respective decrees, took out a portion of the consideration money paid by the plaintiffs, for recovery of the amount paid by them for the purchase of the right, title, and interest of the defendant, Ramtuhul Singh, in the surplus proceeds of the revenue sale of Mehal Mulleck, Alipore, Boozurg, with interest, on the ground that at the time of sale, the defendant, Ramtuhul, had a right to the surplus proceeds of the revenue sale, and that as the debt of the judgment-debtor had been satisfied with the amount paid by the plaintiffs, they were entitled to recover the amount with interest.

The defendant, Ramtuhul Singh, set up (*inter alia*) in his written statement that he had not acquiesced in the sale for arrears of revenue; that that sale had been set aside by the High Court; that he had no right or interest in the proceeds of that sale; that he did not receive any sum from out of the amount paid by the plaintiffs for the purchase of the surplus proceeds of the revenue sale; and that he was not liable to re-pay the amount to the plaintiffs.

The defendant, Baijnath Sookul, set up in his written statement that the suit was multifarious; that as the sale at which the plaintiffs became purchasers had not been set aside, they were not entitled to recover back the amount paid by them; that he had in good faith caused the surplus proceeds of the revenue sale to be sold; and that, as the plaintiff did not allege any fraud or dishonesty on his part, they were not entitled to recover their purchase-money from him.

The other defendants set up in their respective written statements that they were not liable to pay back the portion of the amount taken out by them from the Court.

The Subordinate Judge held that the suit was not multifarious; that there should have been no sale of the right, title, and interest of Ramtuhul in the surplus proceeds of the revenue sale under s. 242, Act VIII of 1859, but the amount in deposit in the Collectorate should have been ordered to be paid to the judgment-creditor (if there was no other objection to such payment); that what was sold could not be ascertained, as there was an appeal to the Privy Council from the decree of the High Court

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which set aside the revenue sale; that the judgment-debtor Ramtuhul, was not bound to indemnify the plaintiffs for the loss incurred by them—and, citing *Sheikh Mahomed Basirulla v. Sheikh Abdullah* (1), dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Mr. *Evans* (Baboos *Unnodapersaud Banerjee* and *Mohes Chunder Chowdry* with him) for the appellants.

The *Advocate-General* offg. (Mr. *Paul*) (Messrs. *Chauntrell, Knowles, and Roberts* with him) for the respondent Ramtuhul Singh.

Baboos *Chunder Madhub Ghose* and *Abinash Chunder Banerjee* for the respondent Baijunath Sookul.

Mr. *Evans* for the appellants contended that the plaintiffs were entitled to a refund of the purchase-money—*Bank of Hindustan, Cilina, and Japan v. Premchand Rai Ohand* (2). *Sowdamini Chowdrain v. Krishna Kishor Poddar* (3) was not applicable to the present case, as the sale of the money was *ultra vires*. The law (s. 242, Act VIII of 1859) prevents the sale of money in execution of a decree, and prescribes the mode in which it is to be dealt with, towards satisfaction of the decree. The judgment-debtor, having illegally brought to sale property which was not liable to be sold, and induced the plaintiffs to purchase it, was a necessary party to the suit. The revenue sale has been set aside by the High Court. The judicial sale was void for failure of consideration, and for want of power in the Court to sell the money. S. 205, Act VIII of 1859, is modified by s. 237. If the appeal to the Privy Council be successful, neither the purchaser of the talook nor the judgment-creditor would be a loser. The sale was valid in the first instance. It is by the proceedings of the defendant, Ramtuhul, that his interest in the sum of Rs. 35,000 has vanished. He has got back the talook, and the question now is whether the Court

(1) 4 B. L. R., App., 35.

(3) 4 B. L. R., F. B., 11.

(3) 5 Bom. Rep., O. C., 83.

would allow him to retain the talook, as well as the amount paid by the plaintiffs for its purchase. It was no voluntary payment of the debt of Ramtuhul. The payment was made through Ramtuhul's agent, that is, the Court for the purpose, of Ramtuhul, for something sold in which he had no right. It is payment to him for a consideration which has failed. *Sheikh Mahomed Basirulla v. Sheikh Abdulla* (1) is not applicable to the present case, as it is an eviction, not by a third party, but by the person himself who has used the money paid to the plaintiff for the purchase of his interest. The pendency of the appeal before the Privy Council does not alter the case. If the revenue sale be set aside, the purchaser at the sale will be entitled to his purchase-money, and Ramtuhul will take back his property. If the sale be confirmed, the purchaser will take the talook, and Ramtuhul will be entitled to the purchase-money, the plaintiffs waiving their right to the surplus proceeds of sale.

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Baboo *Unnodapersaud Banerjee*, on the same side, contended that, if the order of the Civil Court had been for payment to the decree-holders of the surplus proceeds of the revenue sale, instead of the order for sale of the surplus proceeds, the judgment-debtor would have had, under s. 34, Act XI of 1859, to pay the amount so taken away before he could obtain possession, although by a different proceeding the debt of the judgment-debtor is satisfied. Upon the same principle, the defendant, Ramtuhul, cannot be permitted to have the sale annulled, and at the same time retain the benefit of the money paid by the plaintiffs, and applied towards satisfaction of his decree.

The *Advocate-General* contended that the case of *Sheikh Mahomed Basirulla v. Sheikh Abdulla* (1) was applicable to the present case. The purchaser is not entitled to get back his money as, the judicial sale has not been set aside. The revenue sale is not finally set aside since the appeal to the Privy Council is pending. The plaintiffs have no right of

(1) 4 B. L. R., App., 35.

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action. Even if the sale be invalid, they have no right to recover the amount. The payment was not made at the request of Ramtuhul nor to his use. There is no case in which the Court has been considered an agent for the judgment-debtor. The claim may be against the judgment-creditor. The sale was not effected by Ramtuhul. There was no agency in the Court. There is no privity between the judgment-debtor and the Court. The subject of sale was the money in deposit in the Collectorate. When a person with his eyes open purchases a thing, and afterwards finds that the judgment-debtor has no title, he cannot say that the consideration has failed.

Baboo *Abinash Chunder Banerjee* for the respondent, *Baijnathi Sookul*, contended that there was no cause of action against the decree-holder. The plaint discloses no cause of action against him. If the judicial sale is valid and there is no contention against its validity, any act done by the judgment-debtor cannot be set up against the decree-holder.

Baboo *Unmodapersaud Banerjee*, in reply, cited *Rambus Chittangeo v. Modhoosoodun Paul Chowdhry* (1).

The judgment of the Court was delivered by

COUGH, C. J. (who, after shortly stating the facts, continued).—The case of *Sowdamini Chowdrain v. Krishna Kishor Poddar* (2) is different from the present, and the decision there does not, I think, apply to it. There the plaintiff had lost the property which he had bought in consequence of its being found that the judgment-debtor had no title whatever to it, a third person having recovered it by showing that he was the person lawfully entitled to it. In the present case, the loss to the plaintiffs was caused, not by the judgment-debtor having no title to the property, but by his asserting his title, and by virtue of his getting the sale set aside. He has obtained a decree of this Court by which he has recovered the property, and if the plaintiffs do not succeed in the present suit, he will not only

(1) Ref from S. C. C., Kishnaghar, 15th April 1867. (2) 4 B. L. R., F. B., 11.

keep it, but will get debts to the amount of Rs. 8,000, for which his property was liable to be attached and sold, paid with the plaintiffs' money.

I think the rule that ought to be applied in this case is that which is applied by Courts of Equity, where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale. Lord Cottenham, in *Bellamy v. Sabine* (1), says as to such cases:—"The Court proceeds upon the ground that as the transaction ought never to have taken place, so the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction." That rule is applied by him in the case quoted to the setting aside a conveyance on account of fraud and ordering a reconveyance. If in such a case the purchaser is to have back his purchase-money, it is equitable that he should in the present case. The rule is also applied where an annuity is set aside on account of a defect in the memorial; an account is taken, and the defendant, the purchaser of the annuity, is allowed his principal and interest and costs. The remarks of the Subordinate Judge in regard to the nature of this purchase by the plaintiff, might, in many cases, be applied to the purchase of an annuity, frequently a very speculative transaction. There is also another instance which may be mentioned, in the case of *Belcher v. Vardon* (2), where securities were set aside on account of usury at the instance of the assignees of a bankrupt. In that case, the defendant had leave to prove his advances with legal interest.

I am of opinion that the rule ought to be applied in the present case, and that the plaintiffs are entitled to be restored to the position in which they would have been if the sale for the Government revenue had not taken place. It is a mistake to apply to a case like the present the rule stated in Addison on Contracts as to voluntary payments. The payment here was not voluntary; it was made on account of the purchase, and is not to be regarded as a voluntary payment. It is true that the plaintiffs were not parties to the sale and purchase which was

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BHISSEN
LALL SARKO
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KANTHUL
SINGH.

(1) 2 Phillips, 425, see 442.

(2) 2 Collyer, 162, see 175.

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set aside. They bought the interest in the surplus, but the consequence of the judgment-debtor succeeding in setting aside the Government sale was to obliterate the surplus and prevent the plaintiffs from getting any part from it. I think the proper course would have been to have made the present plaintiffs parties to the suit for setting aside the Government sale, if the purchase by the plaintiff was confirmed before the hearing of the suit, as they had an interest in the sale not being set aside, and would be affected by the result. It does not appear when the suit for setting aside the sale was heard. If they had been parties to that suit, the Court, in making the decree setting aside the sale, ought, and, it must be presumed, would have directed that it should be set aside upon the plaintiff therein paying to the present plaintiffs the money which they had paid. Lord Cottenham says in the passage which follows the one I have quoted :—"In setting aside sales of this kind, the Court considers the purchaser as in the situation of a mortgagee, so far as he has made payments in consequence of the sale." On that ground therefore, I think the plaintiffs are entitled to succeed in the present suit, and to recover what they have claimed for the principal money and interest.

In consequence of an appeal being now pending in the Privy Council, it is necessary to declare that, should it be successful and the decree of this Court be reversed, and the sale for arrears of revenue stand good, the present plaintiffs are not to have any rights whatever in consequence of it. By bringing this suit, they elect to consider the sale as set aside, and to have back their purchase-money. Having made their election and treated the sale as set aside, they cannot take advantage of any decision that may be made by the Privy Council reversing that. They must abide by what they now ask for, and the sale, so far as they are concerned, must be treated as finally set aside.

Then the next question to be considered is in regard to the costs. The plaintiffs have shown that they are entitled to succeed in the suit, and the person who is liable to pay the money is the first defendant, Ramtuhul Singh, and he ought to pay the plaintiffs' costs of the suit.

As to the second defendant, the representative of Sheo

Pershad Singh, he attached the surplus in the hands of the Collector, which he had the right to do, but then he ought to have ascertained whether, instead of putting up to sale the share of the surplus, which seems to have amounted to more than Rs. 35,000, he could not have obtained an order to have the amount which was due to him, Rs. 4,970-9-3½, paid to him. His conduct appears to be such that he ought not to receive his costs, but ought to be made to pay them himself.

As to the third, fourth, fifth, and sixth defendants, namely the other decree-holders who were paid out of what remained of the purchase-money paid by the plaintiffs after satisfying Sheo Pershad Singh, they do not appear deserving of any blame. They received their money from the Court out of what remained after satisfying the attaching creditor, and they ought not to have been made parties to the suit. The plaintiffs must therefore pay their costs.

There will be a decree accordingly, and the plaintiffs will recover from the first defendant the amount claimed with costs.

Appeal allowed.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Kemp.

SITARAM, *alias* KERRA HEERAH, (DEFENDANT) v. MUSSAMUT AHEEREE HEERAHNEE (PLAINTIFF).*

1878
May 9.

Hindu Law—Marriage—Public Policy—Void Contract—Assam.

A contract entered into by Hindus living in Assam by which it is agreed that upon the happening of a certain event, a marriage is to become null and void, is contrary to the policy of the law, and a suit cannot be maintained upon it.

In this case the plaintiff sued to have her marriage with the defendant cancelled, alleging that he had violated the conditions of a bond executed by him before his marriage with her, by which he engaged to consider his marriage void if he ever left

* Special Appeal, No. 686 of 1872, from a decree of the Assistant Commissioner and Subordinate Judge of Burpettah, dated the 15th January 1872, reversing a decree of the Munsif of that District, dated the 9th September 1871.

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the village in which the plaintiff and her freinds resided, or in case of cruelty, or in the even of his marrying another woman.

The defendant denied having executed the bond, or having married again, or having acted cruelly to the plaintiff, and therefore denied the jurisdiction of the Court to find that his marriage with the plaintiff was null and void.

The plaintiff had obtained, on the 10th September 1869, an *ex parte* decree against the defendant, declaring her marriage to be null and void according to the terms of the bond given by the defendant, and it would appear that, on the strength of this decree, she married again, and her right to do so was not questioned by the defendant.

On the 24th April 1871, the defendant applied for a rehearing of the case which had been decided *ex parte*, and on the 25th August 1871, the suit was reheard by the Munsif who was officiating for the Munsif who had passed the *ex parte* decree.

The Munsif found that the execution of the bond was not proved; that the defendant had never been guilty of any infringement of the terms of the bond; and that, even if the bond had been proved, it was not legal, as its terms were in opposition to the provisions of Hindu law, which recognizes no provisions for divorce after the parties have once been married.

From this decree the plaintiff appealed to the Subordinate Judge of Burpettah. The Judge held that the bond was proved; and went on to say that the officiating Munsif had asserted that the Hindu law contained no provision for divorce, but that the Court, under the provisions of Act II of 1855, could take cognizance of numerous decisions passed by the local Courts in Assam by which the rights of the so-called Hindu inhabitants of the province to the privilege of divorce had been recognized; that in fact nothing was more common than for a husband and wife to agree to a divorce by a duly executed deed, stating that they had mutually consented to dissolve the contract, and that in such cases the wife has been deemed free to marry again; that when no written deed of divorce was executed, the ceremony of tearing a betel-leaf in two by the parties was considered sufficient for all purposes; that whatever the provisions of Hindu law might be as regards

the inhabitants of Bengal, it was clear that, so far as the question of divorce was concerned, it failed to agree with local usage in Assam, which was to become operative in the event of the defendant being guilty of violation of certain conditions, and that the conditions were proved to have been violated. The Judge reversed the order of the lower Court, and allowed the plaintiffs appeal with costs. The defendant appealed to the High Court.

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SPTARAM, alias
KERRA
HEERAN,
vs.
MUHAMMUT
ABDULLAH
HEERANKEE.

Baboo Abhoy Ohurn Bose for the appellant.—Divorce is not allowed by Hindu law—*Reg. v. Karsan Goja* (1). Even if there were a custom allowing divorce, it could not prevail against the express provisions of the law. There is no evidence of such a custom.

Baboo Rogonauth Bose for the respondent.—[Couch, C.J.—You have to show that a custom in Assam which varies Hindu law can be admitted.] The Assamese are not strictly Hindus, therefore it cannot be said that they are bound by the strict letter of Hindu law. It cannot be said that such a contract is immoral, as there is a law allowing divorce. The Court had power to take cognizance of the local custom, and when that is proved, it overrides the strict letter of the law.

Baboo Abhoy Ohurn Bose in reply.—The custom if proved will not override the law. The Hindu law of Bengal Proper is applicable to Assam—*Deepo Dabee v. Gobindo Deb* (2).

(1) 2 Bom. H. C. Rep., 124.

No one appeared for the respondent.

(2) Before Mr. Justice E. Jackson and
Mr. Justice Mookenjee.

The 9th June 1871.

THE Court delivered the following judgments:—

DEEPO DABEE (PLAINTIFF) v.
GOBINDO DEB (DEFENDANT).*

Hindu Law—Widow—Limitation—
Assam.

Baboo Bhaggyabaty Ohurn Ghose for
the appellant.

E. JACKSON, J.—This case was before this Court on a former occasion, when it was remanded to the lower Appellate Court, certain errors in law having been pointed out in its decision, and it was directed to make further enquiry into

* Special Appeal, No. 1649 of 1870, from a decree of the Subordinate Judge of Kamrup dated the 13th May 1870, reversing a decree of the Munsif of that district, dated the 19th February 1869.

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The following judgments were delivered :—

SITAHAM, *alias*
KERRA,
HEERAH,
-v-

MUSSAMUT
AHZAREE
HEERAHNEE.

COUCH, C. J.—I take the description of the suit from the judgment of the Assistant Commissioner which is appealed from.

the case, and to pass a fresh decision upon it. The suit was by the plaintiff as the widow of one Ramdeb, for a declaration of her right and title to a certain piece of *dharma* land, which she alleged formerly belonged to her husband, and of which she asserted she had been always in possession; but which the defendant had got registered in his own name, as well as in her (plaintiff's) name.

The defendant alleged that, on the death of Ramdeb, his father succeeded to Ramdeb's property as his next of kin, and that he and his father had been in possession since Ramdeb's death, and that the plaintiff was not entitled to any portion of the *dharma* land.

The first Court came to the conclusion that the plaintiff and the defendant were each entitled to eight annas of the land; that the property was family property; and the grandfathers of the parties had been brothers equally entitled to the land which devolved in equal shares on their descendants, the plaintiff's husband and the defendants.

On reviewing his decision, the Assistant Commissioner and Subordinate Judge of Burpettah has come to the conclusion that the plaintiff's claim is wholly barred by limitation. He finds that the plaintiff is actually residing upon a portion of the land, and holds a portion of it in her *khas* possession but he finds that the defendant has been managing the property for the last 30 years since the death of the plaintiff's husband, and he therefore considers that the plaintiff's title, if any, has lapsed under the law of limitation.

Upon this point this special appeal is preferred to this Court; and it has been pointed out that the decision of the lower Appellate Court is evidently wrong, inasmuch as the very fact of

this lady residing actually on this land, and holding in her own sole possession a portion of it, is sufficient to prevent the bar of the law of limitation, at least as regards that portion of it which is in her *khas* possession. Then there is the other fact that the names of both the plaintiff and the defendant have been registered as proprietors of the land since the year 1264 (1857). Even though proved to those years, the defendant's father's name alone had been registered, still such a change having been made with the assent of the defendant's father, previous undoubtedly that the defendant's father admitted that his possession of the land up to that time had not been independent of and adverse to the plaintiff's right. The entry of the plaintiff's name conjointly with the defendant's is a distinct declaration at least that the plaintiff was jointly entitled to this land with the defendant. It is impossible under these circumstances to understand how the Assistant Commissioner has come to the conclusion that the plaintiff's claim is barred under the law of limitation. We set aside his decision on this point.

There only remains then to consider the finding of the Assistant Commissioner on the merits. It was pointed out to him on the former occasion that he was wrong in stating that the defendant, as a cousin of the plaintiff's husband, was his next of kin, and that he was entitled to succeed to the plaintiff's husband's property, the widow only obtaining maintenance from him. It was pointed out to him that this was contrary to ordinary Hindu law. The Assistant Commissioner states in his judgment that, although it may be the law in Bengal that a widow succeeds to her husband's estate, still that such is not always the Hindu law, inasmuch as under the Benares school, in certain

He says:—"The plaintiff sues to have her marriage with the defendant cancelled on the strength of a bond executed by him before his marriage with her by which he engaged to consider his marriage void if he ever left the village in which the plaintiff and her friends reside, or in case of cruelty, or in the event of his ever marrying another wife." He founds his decision upon a breach of that agreement, saying the "violation of its conditions" (the conditions of the bond) "are shown to have occurred.

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circumstances, the widow has no right of succession to the husband's property. And I understand him to presume that it is possible it may not be the law in Assam.

It does not appear that any of the parties in this case asserted that the ordinary Hindu law did not apply; it does not appear that the Assistant Commissioner had any ground for saying that the ordinary Hindu law does not apply in the province of Assam. If the law differs in Assam, there must be some proof of that fact, it might have been distinctly pleaded, but it was not, and it might of course have been easily proved, but there was no attempt to prove it. It is quite true that the widow only obtains a life-interest in the property, and that she is unable to transfer it except for her life. But there seems to be no ground whatever for the presumption made by the Assistant Commissioner to the effect that the law in Assam differs from the ordinary law in Bengal. The widow is under the Hindu law entitled to succeed to her husband's property, and is entitled to have her name registered as the proprietor of this land. The first Court seems to have gone very carefully into the rights of the parties, and that Court came to the conclusion that the plaintiff and the defendant are each equally entitled to 8 annas of the disputed land. There is nothing in the decision of the lower Appellate Court upon which we can find that the first Court was in any way in error in arriving at that conclusion. We are therefore obliged again to set aside the

decision of the Assistant Commissioner. and to restore the decision of the first Court.

Each party will pay his own costs of this litigation.

MOOKERJEE, J.—I am also of opinion that the Assistant Commissioner is wholly wrong in dismissing the suit of the plaintiff. I cannot make out how the Commissioner thinks that the law of inheritance in Assam is different from the law prevalent in Bengal i.e., the law of the Dayabhaga. The defendant never raised that contention and never pleaded that, under either the Mitakshara or any other system of law, he is a preferential heir to the deceased Ramdeb, or that the widow is no heir at all. The plea put forward appears to be that inasmuch as Ramdeb had, at the time of his death bequeathed his share to the defendant's father, the widow is not entitled to succeed. This is not a plea that the widow is not an heir according to the law prevalent in Assam, but it is quite consistent with the law of Bengal proper, i.e., the law of the Dayabhaga. The first Court found that the defendant has not been able to substantiate his allegation of a bequest, and therefore gave a decree of a moiety of the property to the plaintiff in right of her husband. Where the assistant Commissioner got a different Hindu law for Assam is not at all clear to me.

I also would restore the decision of the first Court, and reverse that of the Commissioner. Under the circumstances of the case, each party should pay his own costs throughout.

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HERRAHNEE.

I therefore reverse the order of the lower Court, and decree the plaintiff's claim by which her marriage with the defendant is to be deemed void, with effect from date on which it is shown he violated the condition of the marriage agreement." The Assistant Commissioner says that he can take notice of certain decisions of the Courts of Assam, which show what he considers to be a usage which would support this decree, but the usage which he describes is not one of persons making an agreement of this kind that a marriage about to be contracted is to become void on the happening of certain events, but a usage which recognizes that, amongst Hindus in Assam, there may be a divorce, and that persons may, by consequence, effect one. That is very different from a usage which would sanction a contract of this description. I am supposing that the Assistant Commissioner had authority to decide this case according to what was the usage in Assam, and that the rules of Hindu law might be modified by the usage. I am not prepared to say that this is the case, and it is not necessary for us to give an opinion upon that point. In order to support this decision, we must come to the conclusion that an agreement of this kind by which persons, when they are going to contract a marriage, agree that it shall become void on the happening of a certain event, for instance, as in this case, if the husband does not continue to reside in the wife's village, is valid, and can alter the law of marriage prevailing amongst Hindus.

We think it is contrary to the policy of the law to allow persons by a contract between themselves to avoid a marriage on the happening of any event they may think fit to fix upon. According to this judgment, they might have agreed that the marriage should become void on the happening of any other event, such as, if the husband went to any particular place, or did some other act. An agreement of this kind is contrary to the policy of the law, and persons subject to it cannot be allowed to alter the law in that way. Therefore the decision of the Assistant Commissioner must be reversed. It is immaterial whether the contract was entered into or not, as it would not render the marriage void. A suit cannot be maintained upon such a bond as this.

The appeal must be allowed, and the suit of the plaintiff dismissed with costs.

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SITAMAM, *alias*
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HEERAH
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AHMAD
HEERAHNEE.

KEMP, J.—I wish to add that I entirely concur in this judgment. One of the conditions of this bond was that, if the husband, who is a Hindu, married, again, his first marriage would be considered null and void. Now, supposing this lady who now sues to have her marriage cancelled happened to be barren, the husband, if this contract was one which could be enforced, would not, by reason of that contract, be able to marry again without running the risk of having his marriage with the first wife cancelled. I think such a contract quite contrary to the policy and spirit of the Hindu law, and that the suit ought to be dismissed.

Appeal allowed.

Before Mr. Justice Kemp and Mr. Justice Pontifex.

BICHOOK NATH PANDAY (PLAINTIFF) v. RAM LOCHUN SINGH
(DEFENDANT).*

1873
Feb'y. 19.

*Interest, Rate of—Bond payable by Instalments—Penalty—Liquidated
Damages.*

The defendant executed a bond in favor of the plaintiff by which he agreed to pay "interest at 8 annas *per cent.* month after month, and to repay the principal money within the period of three years." It was further stipulated in the bond that, "should I fail to pay the principal and interest as agreed upon, I shall pay interest at 4 *per cent. per mensem* from the date of this bond to that of liquidation." The defendant made default in payment. *Held* in a suit brought on the bond that the stipulation in the bond for the payment of interest at 4 *per cent. per mensem* was in the nature of a penalty, and the plaintiff was only entitled to recover interest at a reasonable rate. In this case 1 *per cent. per mensem.* was given.

See also
12 B L R 468

This was a suit to recover Rs. 1,507-3 as principal and interest due on a bond dated 1st Assin 1275, Fuslee (14th September 1867), executed by the defendant in favor of the plaintiff. The material portion of the bond was as follows:—

"I, Ram Lochun Singh, execute this to the effect following:—

* Special appeal, N. 709 of 1872, from a decree of the Judge of Bhaugulpore, dated the 9th January 1872, modifying a decree of the Subordinate Judge of that district, dated the 2nd December 1870.

1873 I have borrowed and received the sum of Co.'s Rs. 600 on interest from Bichook Nath Panday, and agreed to pay interest on the said amount at 8 annas *per cent.* month after month, and to repay the principal money within the period of three years. For the said amount, principal and interest, I do hereby mortgage and pledge 1 anna 4 pies out of the entire Mehal Koondoo-war, bearing a sudder jumma of Rs. 380; should the mehal in question happen to be sold by auction for arrears of Government revenue, to be attached, or sold, or involved in a suit for debts due to other creditors, this mahajun or creditor shall have authority to realize the money by any means he chooses without waiting for the expiration of the term of this bond. Should I fail to pay the principal and interest as agreed upon, I shall pay interest at 4 *per cent. per mensem* from date of this bond to that of liquidation. On this agreement I have taken the money and given the bond or writing."

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The defendant made default in payment, and the plaintiff instituted the present suit on 2nd November 1870. The defendant admitted the execution of the bond, and the plaintiff contended that he was entitled to a decree for the whole amount of principal with interest at 4 *per cent. per mensem*. The Subordinate Judge gave a decree for the principal with interest at 8 annas *per cent. per mensem*.

On appeal, the Judge held that the plaintiff was only entitled to a reasonable rate of interest, and he made a decree for the principal with interest at the rate of 12 *per cent. per annum* from the date of the bond to the date of the decree, and after decree at the rate of 6 *per cent. per annum*.

The plaintiff appealed to the High Court.

Bahoos Romesh Chunder Mitter and Kalikishen Sein, for the appellant, contended that, on non-payment by the defendant, the plaintiff was entitled to interest at the rate stipulated for in the bond on that event occurring, *viz.*, 4 *per cent. per mensem*. By s. 2 of Act XXVIII of 1855, the Court is bound the decree the interest at the rate stipulated for between the parties, If it had been stipulated that interest should be paid at 4 *per cent. per mensem*, but in case of punctual payment at a less rate, the Court would have been bound in case of default to not affected by the phraseology that may be used. The parties

give interest at the larger amount. They cited the cases of *Peetambur Chatterjee v. Kaleechurn Roy* (1), *Raskessur Surmah V.*

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NATH PANDAY

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SINGH.

(1) *Before Mr. Justice Bayley and Mr. Justice E. Jackson.*

The 1st December 1870.

PEETAMBUR CHATTERJEE (PLAINTIFF) v. KALEECHURN ROY AND ANOTHER (DEFENDANTS).*

Interest, Rate of—Bond payable by Instalments—Penalty.

Baboo Bamachurn Banerjee for the appellant.

Messrs. G. A. Twidale and H. A. Mendies for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—This was a suit to recover a sum of Rs. 700 lent upon an agreement to the effect that it should be repaid with interest at 8 annas *per cent. per mensem*, by instalments of Rs. 100 in the month of Falgun (11th February to 12th March) each year from 1268 to 1276 (1862 to 1870); the remainder to be paid in 1277 (1871). There was also a clause in the agreement that, if in four years these instalments were not paid, the interest to be paid on the Rs. 700 would be at the rate of Rs. 1 *per cent. per mensem*. The plaintiff brought this suit demanding interest at the higher rate, on the allegation that for five or six years after the money had been lent, no instalment was paid as agreed upon.

Both the Courts below have dismissed the plaintiff's claim to higher interest than 8 annas *per cent*. Both have come to the conclusion that the stipulation as to the higher percentage was a penalty, and the plaintiff had no sufficient ground to recover at that rate. It is upon this ground that this special appeal has been preferred to this Court, and it is urged that the higher percentage was clearly due under the express terms of the agreement between the parties.

On the part of the respondents, we have been referred to a decision of this Court, in *Boley Dobey v. Sideswar Rao Baboo Roy Kur* (a), in which it was held that where a smaller sum is secured by a larger sum, that larger sum may be looked upon as a penalty. In that case, the money had been lent at the rate of 1 *per cent. per mensem*, and there was a stipulation that, if a certain number of instalments were not paid, the whole amount would be considered to have lapsed, and the loan would bear interest at the rate of 10 *per cent. per mensem*. We think that the facts of that case are very different from those of this, and the question whether the higher rate of percentage should be looked upon as a penalty or not depends upon the circumstances of the case. Ten *per cent. per mensem* is an extraordinary high rate of interest, and the result of that stipulation in the bond was that the recovery of the amount was considered so doubtful, that an interest in the sum of Rs. 5,500 was sold for Rs. 800. This case in no way seems to agree with that case. In this case, the terms granted to the defendants at first were below the ordinary terms on which money is usually lent in this country, and it was almost a favor shown to the defendants that such terms were granted; and the penalty was not that any excessive rate should be paid, but that the ordinary rate at 1 *per cent.* should be paid. There was also in this case other landed security for the payment of the money, and it does seem if the meaning of the parties solely was that, if any delay occurred in the repayment of the money, the lender should receive interest at the ordinary rate of 1 *per cent. per mensem*.

We set aside the decision of the lower

* Special Appeal, No. 837 of 1870, from decree passed by Subordinate Judge of Beerbhoom, dated the 12th February 1870, modifying a decree of the Sudder Munsiff of that district, dated, the 18th September 1869.

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NATH PANDAY
v.
RAM LOCHUN
SINGH.

Kaleekanath Surmah (1), Shah Makhanlal v. Srikrishna Sing (2), and Mussamut Sohodea Beebee v. Baboo Deendyal Lall (3).

Courts, and decree the plaintiff's suit with all costs with reference to the above remarks. A decree will be drawn up in accordance with the judgment above given.

(1) *Before Mr. Justice Norman and Mr. Justice E. Jackson.*

The 7th May 1869.

RASHESSUR SURMAH (DEFENDANT) v.
KALEEKANATH SURMAH AND AN-
OTHER (PLAINTIFFS).*

Interest, Rate of—Bond payable by Instalments.

Baboo Ohhay Churn Bose for the appellant.

Baboo Mohini Mohun Roy for the respondents.

THE judgment of the Court was delivered by

NORMAN, J.—It is clear that there is no ground for this appeal.

The first point taken is that the bond of Rs. 800, upon which the suit of brought, was given to the two plaintiffs, and that the two plaintiffs had advanced different sums making up the amount of Rs. 800, and that therefore having separate interests in the money to be recovered, they could not sue jointly. But if the defendant has, for any reason, given a bond to both plaintiffs jointly for the entire sum borrowed, he cannot raise any objection of this nature. The plaintiffs can settle their respective rights in the money to be recovered amongst themselves. It is a matter with which the defendant has no concern. The plaintiffs are not suing for the original loans for the sums separately advanced by each of them, but they are suing jointly for the amount specified in the bond executed by the defendant to them jointly.

It is also objected that the rate of

interest decreed, namely, Rs. 2-8 per cent. per mensem, is exorbitant. But the lower Court was justified in giving interest at the rate stipulated in the bond down to the date of decree. In ordinary business transactions when money is taken on loan, and it is stipulated that interest is to be paid at a certain rate, that interest represents the consideration agreed to be paid by the borrower to the lender for the use of the money or forbearance to enforce repayment. But parties usually understand that, as long as the contract continues in force, all the terms of it will continue, and amongst others, the terms as to the rate of interest for the use of the money on loan. But after the date of the decree, a new state of circumstances arises. The contract ceases to become merged in the decree, and the plaintiff recovers under that decree such interest, as according to the course and practice of the Court, is allowed on debts for which the creditor has the security of its decree. We think that the decree of the lower Court also be modified to the extent of reducing the rate of interest to 12 per cent. per annum from the date of decree.

For the rest, the appeal is dismissed with costs payable to the respondents.

(2) 2 B. L. R., P. C., 41.

(3) *Before Mr. Justice L. S. Jackson and Mr. Justice Paul.*

The 13th July 1871.

MUSSAMUT SOHODEA BEBEE (DEFENDANT) v. BABOO DEENDYAL LALL (PLAINTIFF).†

Interest, Rate of—Bond—Penalty.

THIS was a suit to recover Rs. 3,295 as principal and interest due on a bond

*Special Appeal, No. 2946 of 1868, from a decree of the Deputy Commissioner of Sibsaagar, dated the 27th June 1868, affirming a decree of the Moonsiff of that district, dated the 30th November 1867,

† Special Appeal, No. 423 of 1871, from a decree of the Officiating Judge of Gya, dated the 8th February 1871, reversing a decree of the Subordinate Judge of that place, dated the 14th June 1870.

Baboo Taruck Nath Dutt, for the respondent. contended, that the clause in the bond which was relied on by the plaintiff. was a mere penalty clause, which the court would not enforce. He cited *Boley Dobey v. Sideswar Rao Baboo Roy Kur* (1).

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The judgment of the Court was delivered by PONTINEX, J. (who after reading the material portion of the bond continued).—From this it appears that, if default was not made in payment of the principal and interest, the loan was made at less than the usual rate of interest; but it would also

for Rs. 8,000 executed by the defendant to the plaintiff, dated 31st August 1867.

The conditions in the bond were that the amount of the loan was to bear interest at the rate of Rs. 1-8 *per mensem* for three months when the principal and interest was to be repaid, and that, in the event of its not being then repaid, an enhanced rate of interest at 5 *per cent. per mensem* would be levied (in lieu of the first-named interest) from the date of the execution of the bond to the date of liquidation thereof. The loan was not repaid in the time specified, but one day afterwards the defendant wrote to the plaintiff requesting him to accept the amount due on the bond, and some 13 days after this she deposited Rs. 8,000 in the hands of a third party from whom the defendant received it. The Subordinate Judge raised the issue, "at what rate is the plaintiff entitled to recover interest:" and it was contended for the defendant that the second condition as to the payment of interest at 5 *per cent. per mensem* was a penal provision, and that the plaintiff was not entitled to recover the same. For the plaintiff it was contended that as Act XXVIII of 1855 provides that the Courts should award interest according to what may have been stipulated between contracting parties, the second condition, which was made by the consent of both parties, and was to operate only in the event of the first condition not being fulfilled, should be carried out by the defendant,

and should not be looked upon as a penal provision.

The Subordinate Judge held that second condition in the bond was a penal provision, and could not be enforced. He gave a decree for interest at the rate of Rs. 1-8 *per cent. per mensem* up to date of suit, with interest from date of decree to date of satisfaction at rate of 1 *per cent. per mensem*. The Judge on appeal reversed the decision of the Subordinate Judge, and decreed the claim in accordance with the terms of the bond, with interest on the decree at 6 *per cent. per annum*.

The defendant appealed to the High Court, on the ground that the Judge was wrong in awarding interest at 5 *per cent. per mensem* from the date of the execution of the bond, for the condition in the bond was in the nature of a penalty, and could not be enforced by a Court of Justice.

Baboo Kissen Succa Mookerjee and Chunder Madhab Ghose for the appellant.

Baboo Mohini Mohun Roy and Nilmadhub Sen for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—This special appeal is dismissed with costs.

(1) 4 B. L. R., App., 92.

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appear from the amount of the sudder jumina that the property hypothecated was an ample security for the loan.

Both of the lower Courts have decided that the provision in the bond, which is to take effect in default of punctual payment, must be treated as in the nature of a penalty, and the Judge of Bhaugulpore has accordingly given a judgment to the appellant for the principal amount, but together with interest calculated at 12 *per cent. per annum* in satisfaction of such penalty.

The facts of the case are that default was made in payment of the principal at the expiration of three years from the date of the bond. It does not clearly appear, but I will assume for the purpose of this decision that default was made throughout the three years in payment of the monthly interest. The appellant might have sued on the bond for each monthly instalment of interest. This he did not do. But one month and twenty days after the expiration of the period of three years, the appellant instituted the present suit. It would appear that the respondent was at the date of the institution of the suit prepared to pay the principal (with the exception of a trifling sum of Rs. 25 about which there was a dispute, but which the respondent agree to pay if the appellant would vouch for it having been advanced), but objected to pay interest at the rate of 4 *per sent. per mensem* according to the default proviso in the bond.

The appellant before us insists that, having regard to s. 2, Act XXVIII of 1855, the Court is bound to decree the interest at 4 *per sent. per mensem*, and cannot relieve against the proviso as being in the nature of a penalty. The words of that section are:—"In any suit in which interest is recoverable, the amount shall be adjudge or decreed by the Court at the rate (if any) agreed upon by the parties." But that section in my opinion does not affect the question of penalty or no penalty. It leaves it still open for the Court to decide whether the 4 *per sent. per mensem* "was agreed upon by the parties at interest," or whether it was intended as a penalty. Other wise in no case, however gross and oppressive it might be, if the parties used the words "interest," could the Court interfere. Such agreement is met by the numerous cases which decide that the question to be determined of penalty, or no penalty is

to an instrument cannot change the fact by using a particular name, and whether the sum provided to be paid is to be treated as a penalty or as liquidated damages in a question of law to be decided by the Court upon a consideration of the whole instrument in each case—*Sainter v. Ferguson* (1). It has been laid down by the Privy Council in the case of *Dimech v. Corlett* (2) that “the law on the question of penalty or liquidated damages may be considered, after a great number of decision, not perhaps all them strictly reconcilable with each other, to be at length satisfactory settled; and the hinge, on which the decision in every particular case turns, is the intention of the parties collected from the language they have used. The mere use of the term, ‘penalty,’ or the term “liquidated damages” (or in the present case I may add the term “interest”) does not determine that intention; but like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance is, however, of great importance towards arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty, and not in the way of liquidated damages.” To the principal so laid down by the Privy Council may be added the observations of Tindal, J., in the case of *Kemble v. Farren* (3) “that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty appears to be a contradiction in terms; the case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have also in modern time endeavoured to relive, by directing juries to measure and assess the damages actually sustained by the breach of the agreement.”

Applying these principles to the case before us, if one day's

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(1) 7 C. B., 716, see 727; 18 L. J., C. P., 217.

(2) 12 Moore's P. C., 199, see 229.

(3) 3 M. & P., 425, see 441; 8 C., 6 Bing., 141.

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default was in payment at the end of any, even the first, month of the three years' terms, of the interest at the rate of $\frac{1}{4}$ per cent. per mensem, the very large rate of 4 per cent. per mensem would immediately become payable throughout the term; or, in other wards, a very large sum would become immediately payable in consequence of the unpunctual payment of a very small sum. Or, again, if interest at the rate of $\frac{1}{4}$ per cent. per mensem had been punctually paid for first thirty-four months of the term, but one day's default was made in payment of the interest of the thirty-fifth month at the rate, 4 per cent. per mensem would immediately become payable from the very commencement of the term; or, in other wards, a very large sum would become immediately payable in consequence of the unpunctual payment of a very small sum, and notwithstanding punctual payment at the lesser rate for thirty four months. Or, again if interest at the lesser rate had been punctually paid for thirty-five months, but one day's default was made in payment of the principle sum and interest for the thirty-sixth month, and increased sum of Rs. 252 would become immediately payable in respect of interest for the higher rate from the commencement of the term; or, in other wards, in consequence of one day's default in payment of Rs. 603, the large sum of Rs. 855 would immediately become payable.

The pleader for the appellant has pressed upon us a decision by L. S. Jackson and Paul, JJ., in *Mussamut Sohoda Rebee v. Baboo Dendyal Lall* (1) which has not been reported. The paper in this case have been placed before us, and from them it appears that, for securing a loan of Rs. 8,000 for three months, a bond was given which carried interest at 1-8 per cent. per mensem, but contained a proviso that, in the event of the Rs. 8,000 not being repaid at the end of the three months, and enhanced rate of interest at 5 per cent. per mensem would be levied in lieu of the first-named interest from the date of execution of the bond to the date of liquidation thereof. The special appeal was by the debtor whose ground of appeal was that lower Court had been wrong in awarding interest at 5 per cent. per mensem, inasmuch as the condition

(1) *Ante*, p. 138.

in the bond was of the nature of a penalty. The only observations by the learned Judges in that case were "the special appeal is dismissed with costs." In that case the period over which an enhanced payment of interest would extend was only three months, and seemingly the proviso only took effect upon default in payment of the principal, nor does it appear that there was any other than personal security for the debt. But however this may have been, I think every case of this nature must depend on its own circumstances, as stated by the late E. Jackson, J., in the case of *Peetambur Chatterjee v. Kaleshurn Roy* (1) : and I am of opinion that the present case falls within the principle of the case of *Boley Dobey v. Sideswar Rao Baboo Roy Kur* (2) and of *Kemble v. Farren* (3).

It has been argued with some plausibility that, if the bond in this case had contained the stipulation that interest at 4 per cent. *per mensem* should be paid reducible to $\frac{1}{2}$ per cent. on punctual payment, the Court must have decreed interest at the rate of 4 per cent. *per mensem*, and further that the proviso in the bond should be construed as an alternative stipulation arising on the happening of a particular event, and that as that event has arisen, the proviso is now the only substantive agreement between the parties. But the answer to this argument is that, instead of being an alternative stipulation arising on an independent event, it is in fact only a proviso to arise on a breach of the original and substantial contract between the parties ; and the question is whether such proviso is to be treated as a penalty, or as a stipulation in the nature of liquidated damages for such breach of contract ; and with respect to the argument that, if the stipulation had been 4 per cent. *per mensem* reducible on punctual payment, interest at 4 per cent. *per mensem* must have been awarded, it may be observed that in that case 4 per cent *per mensem* would have been the substantive primary contract between the parties, and not a penal rate to arise on breach of the substantive contract ; and that it is improbable that any borrower, having ample security to offer, as was the fact in the present case, would enter into a

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(1) *Ante*, p. 137.

(3) 3 M. & P., 425 ; S. C., 6 Bing., 141,

(2) 4 B. L. R., App., 92.

1873 contract under which he would be primarily liable to pay 48 per cent. *per annum* for the loan.

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SINGH. Under the circumstances of this case, I am therefore of opinion that the decisions of the Court below are correct in treating the proviso in the bond as in the nature of a penalty ; and I also think that the lower Appellate Court has done substantial justice between the parties in awarding damages for the breach of contract by decreeing interest at the rate of 1 per cent. *per mensem* from the date of the bond, and I accordingly think that this special appeal should be dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

TOOLSEEMONEY DOSSEE v. MARIA MARGERY CORNELIUS
AND OTHERS.

1873
May 27 & 28,
&
June 17.

Illegitimacy—Right to Bastard's Estate—Escheat—Non-assertion of Claim by Crown—Possession—Limitation—Estoppel—Tenant-at will—Wife's Equity to a Settlement—Account—Receiver.

M, the widow and administratrix of a bastard, who had died intestate and without issue, received a letter in 1841 from the Lords Commissioners of the Treasury stating that they did not deem it expedient to take any steps for the assertion of the rights of the Crown with regard to her late husband's estate. Previous to this *M* had obtained possession of that estate, and two months before the receipt of the letter, she had contracted a second marriage. No settlement was made upon this marriage, and since the time of the marriage, *M*'s second husband had had the exclusive management of the property. In execution of a decree against the husband, his right, title, and interest in and to a portion of the property were put up for sale, and purchased by the plaintiff. The plaintiff's right to possession was disputed by *M*, who contended that her husband took no interest in the two-thirds of the property which went to the Crown which could be attached and sold in execution. In a suit by the plaintiff to establish her rights over the property :

Held, that the Crown would be estopped by the line adopted by the Commissioners of the Treasury in 1841 from asserting its claim to the two-thirds ; that *M* had a good title to the whole estate even as against the Crown ; and that the

rights of her husband extended over the whole estate, and were rights which could be seized in execution and sold.

Held further, that *M's* husband being without property and in great difficulties, and subsisting only on a life pension of Rs. 118 a month, *M* was entitled to a settlement.

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In execution of a decree of the High Court against the defendant John Cornelius, his right, title, and interest in and to the house and premises No. 116, South Colinga Street, in Calcutta, were put up for sale, and purchased by the plaintiff for Rs. 20. This house originally belonged to one Thomas Burt, an illegitimate son. About the year 1830, Burt married the defendant Maria Margery, and in 1838 he died intestate and without issue, and leaving his widow his sole representative. At the time of his death he was possessed, amongst other property, of the house in suit. Being illegitimate, the Crown was entitled to two-thirds of his estate, and Mrs. Burt to the remaining one-third. Letters of administration to Burt's estate were in December 1838 granted to the Ecclesiastical Registrar Mr. Dickens, and on the 11th of March 1841 these letters were recalled, and other letters were granted to Mrs. Burt, who thereupon took possession of her husband's estate. On the 12th October 1841, Mrs. Burt married the defendant John Cornelius. On the 7th of December 1841, the Lords Commissioners of Her Majesty's Treasury, in reply to a letter from Mrs. Burt, praying for a relinquishment by the Crown of the two-third parts of her late husband's estate to which the Crown had become entitled, wrote to her that they were advised that the property in question was not of sufficient value to render it expedient for them to take any steps for the assertion of the rights of the Crown. No settlement was made on the marriage of Mrs. Burt to John Cornelius, and from the time of the marriage the property had been under the exclusive management of Mr. Cornelius. He granted leases of the house in his own name; collected the rents, and some twenty years before the present suit he obtained from the Calcutta Municipality a renewal in his own name of the pottah of the ground on which the house was built. Upon the sale to the plaintiff Mrs. Cornelius claimed the property in dispute,

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and the plaintiff then obtained a rule calling on the defendants, Mr. and Mrs. Cornelius, to show cause why possession should not be given to her. Cause being shown by Mrs. Cornelius, the rule was discharged, and the plaintiff thereupon brought the present suit joining the secretary of State as a party defendant. She prayed that she might be declared entitled to an estate for the life of the defendant John Cornelius in the whole of the property, and for possession of the same, or, in case the Court should not consider her to be so entitled, then that she might be declared entitled to the above-mentioned estate in one-third of the property, and for possession thereof; or that a partition might be made, and such one-third share allotted to her in severalty for the life of John Cornelius, and that, if necessary, a receiver might be appointed, with power to pay to her such portion of the rents and profits as she might be declared entitled to, and for an account, and that the defendants, Mr. and Mrs. Cornelius, might be charged a fair occupation rent for the time during which they had been in possession; and that they might be restrained from further interference with the plaintiff's rights in the property.

The Secretary of State entered appearance, but took no further steps the suit.

The defendant John Cornelius did not appear:

Mrs. Cornelius in her written statement alleged *inter alia* that the decree against John Cornelius in execution of which the house was sold was for a debt incurred on his own account, and not in respect of any demand against, or for the benefit of, the estate of Thomas Burt; that the value of the house and premises was over Rs. 25,000; and that since June 1870, her husband had ceased to maintain her and her children.

It was in evidence that John Cornelius was possessed of no property; that he had a pension from Government of Rs. 118 a month which would die with him; and that he was much involved; and that, to escape his creditors, he had gone to live and was living at Chandernagore.

Mr. Lowe and Mr. Evans for the plaintiff.

Mr. Kennedy and Mr. Bonnerjee for Mrs. Cornelius.

Mr. Lowe.—John Cornelius was entitled for his life to one-third of the estate of Thomas Burt. As to the remaining two-thirds, the Crown relinquished its rights more than thirty years ago; and upon his marriage, John Cornelius took an estate therein for the joint lives of himself and his wife. He clearly had an interest in the whole estate which could be attached and sold in execution.

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Mr. Kennedy.—On the death of Burt intestate and without issue, two-thirds of his estate escheated to the Crown. The Crown never made any grant to Mrs. But, and may still assert its rights since no length of time will bar it. If therefore this suit be in the nature of an action of ejectment it must fail, because there is an outstanding legal estate. Until assignment of dower, Mrs. Burt could have no right of entry whatever, inasmuch as it was uncertain what part of the estate she should have for dower, 1 Co Litt., lib. 1, c. 5, s 43. As regards the Crown, Mrs. Burt was a mere intruder, her position being analogous to that of a disseisor, as to which see Bacon's Abr. Title Disseisin, B. Her marriage with Cornelius in no way altered the property. It may be that, after the letter from the Commissioners of the Treasury, the Crown could not have treated her as a trespasser, but even then she and her husband would be mere tenants-at-will, and therefore possessed no assignable estate—1 Co. Litt., lib. 1, c. 8, s. 71. [MACPHERSON, J.—The estate would be not assignable as against the landlord only.] I submit that it would not be assignable at all; any alienation would determine the estate. If John Cornelius could not assign his interest, neither could the Court do so. With respect to the one-third to which Mrs. Burt was entitled as dower, the plaintiff seeking equity must do equity. Mrs. Cornelius is entitled to a settlement—*Sturgis v. Champneys* (1), *Lady Elibank v. Montolieu* and *Murry v. Lord Elibank* (2), *Freeman v. Fairlie* (3) and *Duncombe v. Greenacre* (4).

Mr. Lowe in reply.

Cur. adv. vult.

(1) 5 My. & Cr., 97.

(3) 11 Jur., O. S., 447.

(2) 1 Wh. & Tu., L. C. (3rd ed.),
381 and 383.

(4) 2 De G. F. & J., 509; S. C.
7 Jur., N. S., 175.

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MACPHERSON, J. (who, after stating the prayer of the plaint and the facts, continued).—I think there can be no doubt whatever on the facts proved and admitted by Mrs. Cornelius that her husband became absolutely entitled to receive the rents and profits of the property during the joint lives of himself and his wife. It is contended on behalf of Mrs. Cornelius that her husband, John Cornelius, took no interest in that portion of the property which went to the Crown which could be attached and sold at a sheriff's sale. It is argued that the Crown had still a claim to two-thirds, and that Mrs. and Mr. Cornelius are merely tenants-at-will as regards these two-thirds, and that a tenancy at will is not assignable, and therefore could not be attached and sold by the sheriff. But it seems to me that the position of Mrs. Cornelius with respect to the two thirds is not that of a tenant-at-will. She has a good title as to these two-thirds against the Crown; because even if on the naked question of limitation the Crown would not be barred, it would practically now be estopped, by the line adopted by the Commissioners of the Treasury in 1841, from asserting its claim to these two-thirds. I do not think the Crown could now possibly be heard to claim these two-thirds: and in my opinion, Mrs. Cornelius has a good title to the whole property even as against the Crown, and the rights of Mrs. Cornelius extend over the two-thirds as well as the one-third, and are rights which could be seized in execution and sold.

It was further contended on behalf of Mrs. Cornelius that, if the plaintiff succeeds to any extent, some settlement should be made on her. I think she certainly is entitled to a settlement. It is in evidence that her husband is much involved, and lives at Chandernagore in great difficulties; and he has no property, subsisting only on a pension of Rs. 118 per month from Government, which pension will die with him. Although the plaintiff is declared entitled to an interest in the whole property for the life of John Cornelius, it is subject to a reference as to what will be a proper settlement to make on Mrs. Cornelius and her children. The plaintiff is entitled to an account from the filing of the plaint, but not anterior to it. The plaintiff's interest being a life-interest, the proper course will be to

appoint a receiver of the property for the life of John Cornelius.
I order that the Court Receiver be appointed receiver for the
life of John Cornelius.

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Decree for plaintiff.

Attorney for the plaintiff: Mr. *Watson*.

Attorneys for Mrs. Cornelis: Messrs. *Judge* and *Gangooly*.

Attorney for the Secretary of State: Mr. *Chauntrell*.

PRIVY COUNCIL.

CHOWDRY WAHED ALI (DEPENDANT) v. MUSSAMUT JUMARE
(PLAINTIFF).*

P. C.*
1872
May 10, 11, 22
d.
June 14

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Act XXIII of 1861, s. 11—Decree...Representative—Act VIII of 1859,
s. 203.

The decree of the High Court affirmed under the circumstances of the case, but *held* (contrary to the opinion of the majority of a Full Bench) :—where a decree against a person in a representative capacity has been properly passed, and proceedings have been taken under it to obtain execution against the party in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of Act XXIII of 1861, s. 11.

See also
12 B L R 71

26th 250

THIS was an appeal from a decision of a Full Bench of the High Court given on the 13th August 1868, in which a decree of the Principal Sudder Ameen dated the 27th July 1867 was affirmed by a majority of the Judges.

The circumstances under which the case came before and was decided by the Full Bench, are fully detailed in the report of the case before the High Court (1).

* *Present* :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR MONTAGUE E. SMITH, AND SIR ROBERT P. COLLIER.

(1) 2 B. L. R., F. B., 72.

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Sir *R. Palmer*, Q.C., and Mr. *Doyne*, for the appellant.—Assuming the judgment of the High Court of the 10th July 1863 to have been against the respondent in her representative capacity, and not personally, she could in that suit have urged that ground of exemption, and no new suit is permissible either to restore to her such neglected opportunity, or to correct any error of judgment of the Court in that suit. The effect of that judgment of the 10th July 1863 was in fact to make the respondent personally liable to make good to the appellant the entire mesne profits of the part of the property to which the decree declared the appellant entitled. She having acted in concert with the other defendants to disturb the appellant's possession was personally liable. But in addition to this, she received assets from her father, Waris Ali, not perhaps directly from him, but by possession for some years with her co-heirs of the property. It was clearly not competent to the appellant to bring the present suit: see Act XXIII 1861, s. 11. It cannot seriously be contended that a party sued in a representative capacity is not a party to the suit within the meaning of that section.

Mr. *Cowie* for the respondent.—The Courts have all found as a fact that the property which is the subject-matter of this suit was the property of the respondent in her own individual character, and that she never took any assets by descent from her father. The judgment being against her in her representative character, a sale of her own property in the absence of evidence of a *devastavit* was absolutely void, or, if not void, voidable as against the appellant as purchaser, he being the execution-creditor at whose suit the sale was effected. There is nothing in the Civil Procedure Code to prevent a new suit being instituted to obtain relief when her individual property has been affected by the decree made against her only in her representative character. No proceedings were taken in accordance with ss. 203 and 211 of Act VIII of 1859.

Mr. *Doyne* in reply.

Their LORDSHIPS gave the following judgment :—

This was an appeal from the judgment of a Full Bench of the

High Court at Calcutta, affirming a decision of the Principal Sudder Ameen of Patna in favor of the respondent, the plaintiff in the suit below.

The suit was brought by Mussamut Jumae, the respondent, to obtain a declaration that an execution-sale of certain mouzahs, under color of a decree made in a former suit brought against her and others by the appellant, should be set aside, and her possession of the mouzahs confirmed. It may be convenient to designate the former suit, which led to the sale complained of, as suit A. Suit A was itself the sequel of a protracted litigation, and became in its turn the starting point of new and intricate proceedings.

The appellant, who was mortgagee of Mouzah Mayjara, had obtained decrees in suits against his mortgagors for the mortgage-debt, under which he attached their interest in that mouzah. Waris Ali, the father of the respondent, and the respondent and other persons, intervened, claiming interests in the mouzah. Waris Ali claimed to have advanced money to the mortgagors under certain *bhurnanamas*. The respondent's claim was distinct. She was married to Enayet Ali, and she claimed certain shares of the mouzah under a purchase made previous to the appellant's mortgage. Notwithstanding these claims, the mouzah was sold under the appellant's decrees, and purchased by him. Being unable to obtain possession of the mouzah, the appellant brought suit A to recover it, making Waris Ali and the respondent and other persons (in all 103) defendants, charging them with combining to keep him out of possession. Waris Ali set up his claim under the *bhurnanamas*, which were ultimately held to be invalid. The respondent, however, established her title to the shares of the mouzah she claimed. During the pendency of suit A, *viz.*, in January 1856, Waris Ali died, and thereupon, under the 10th section of Act VIII of 1859, his heirs, *viz.*, the respondent and her brother and sister, were entered in the register as defendants in his place. Thus the respondent became a party to the suit in a double capacity, which led to the confusion in the proceedings to be presently noticed. On the 29th November 1861, the Judge of Patna made a decree in favor of the appellant for possession, and "for

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mesne profits to be charged on the defendants jointly and separately." Although the judge had stated in his judgment that the title of the respondent to the share she claimed was proved, and therefore ought to have decreed to that extent in her favor, his decree does not so find, nor does it separate her from the other defendants in the award of possession and mesne profits against them. This ill-advised and erroneous decree in suit A was the origin of a labyrinth of intricate and too often irregular proceedings, through which it is not easy to find the way to a definite end. The respondent Jumae, amongst others, appeal against it to the High Court. On the 10th July 1863 that Court gave judgment to the effect, that it having been adjudged by the Judge at Patna, that Jumae had a good title as purchaser to the share of the mouzah claimed by her, she was needlessly made a party to the suit, and it was ordered that she should be released from it with costs. This judgment undoubtedly went too far in releasing Jumae altogether from suit A, as her learned counsel, Mr. Cowie, fairly admitted; because the grounds on which it proceeded do not touch her liability in her representative capacity as one of the heirs of Waris Ali; but apparently the decree stands unreversed; a circumstance which it is material to bear in mind.

Although no attempt appears to have been made to review or alter this decree, proceedings, now to be noticed, were taken, by force of which the sale (sought to be set aside in the present suit) of Jumae's private estate to the appellant, as purchaser under his own decree, took place. They are succinctly described by the Chief Justice in the following extract from the judgment now under appeal:—

"On the 17th August 1863, Wahed Ali, the then plaintiff, applied to the Court at Patna to execute the decree which he had obtained for mesne profits. Jumae, the present plaintiff, appeared upon that application and urged, that according to the decree of the High Court of the 10th of July 1863, she had been wholly discharged from liability. Wahed Ali admitted that she had been discharged by that decree so far as her private interests were concerned, but contended that she remained liable as one of the heirs of Waris Ali. The Judge of

Patna took that view of the case, and on the 5th October 1863, ordered a sale of that part of the property which belonged to her in her own right, and which had been attached in execution of the decree. On the 7th of October 1863, the plaintiff petitioned the Judge, contending that, even if she were liable as heiress of her father, she could only be liable, under ss. 203 and 211 of Act VIII of 1859, to the extent of assets inherited from him. On the same day the Judge ordered the petition to be rejected; and, on the following day, the 8th October 1863, the plaintiff's own portion of the property, which had been attached under the execution against her in her representative capacity, was sold under the execution, and Wahed Ali, who was then the plaintiff in the suit, became the purchaser under his own decree. Numerous other Proceedings took place to which it is not necessary to refer. It is sufficient to say that, on the 15th of March 1864, the Judge confirmed the sale.

" The present plaintiff petitioned the High Court against the order for execution and the sale of her property; and, on the 8th of July 1864, the High Court ordered that the decree of the 5th of October 1863 should be amended by declaring that the present plaintiff was only liable to the extent of assets inherited from her father, so that, in fact, the order under which the plaintiff's private property was sold in execution was so far altered that it did not justify the sale which took place under it on the 8th October 1863.

" The plaintiff again appealed to the High Court against the order of the 15th of March 1864, confirming the sale under the execution; and, on the 30th of January 1865, the Court declared that the sale could hold good only if the plaintiff had received assets from her father's estate, and in that case only to the extent of the assets so received. The case was therefore remanded to the Judge to make inquiry upon that point. The Judge upon that remand found that the plaintiff had inherited nothing from her father, and, on the 27th of May 1865, set aside the confirmation of the sale.

" From that order Wahed Ali appealed to the High Court; and, on the 18th September 1865, a Division Bench held that as the sale had been confirmed, there was no power to cancel it;

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that the two orders of the 8th of July 1864 and the 30th of January 1865 were wrong, and they advised Wahed Ali to apply to the High Court for a review of the order of the 30th of January 1865. Wahed Ali acted upon that advice, and applied for a review of the judgment of the 30th of January 1865, and, on the 28th of September 1866, the Division Bench held that the sale could not be set aside except by a suit by the present plaintiff in the Civil Court. They amended the order of the High Court of the 30th of January 1865 and the order of the Judge of the 27th May 1865, and restored and confirmed the Judge's order of the 15th of March 1864, by which the sale had been confirmed."

The above summary seems to be in substance correct, except that the order of the 8th July 1864 appears to be, technically, not an order to amend the decree, but to declare in the execution proceedings what was the limit of Jumae's liability under it. The result, so far as a result can be extricated from these involved and contradictory proceedings, appears to be, that whilst the High Court held the sale of Jumae's private property to be utterly wrong, and at first ordered it to be set aside, they, in the end, reversed their own orders, on formal grounds, leaving the order for sale and confirmation to stand, but suggesting to Jumae to obtain redress by a new suit. Accordingly she brought the present suit, and obtained the concurrent judgments of the Courts of India in her favor, which the appellant now seeks to reverse: first, on the merits; and, second, on the ground that it was not competent to the respondent to bring this suit.

On the merits it was at first contended that she was personally liable in suit A for having acted in concert with the other defendants to disturb the appellant's possession. Their Lordships, however, think that not only is this liability unsustained by the evidence, but the amended decree, in any view of the amending order, absolves her from it.

It was next contended that she had received assets from her father, Waris Ali, and was therefore liable. It was scarcely insisted that any had descended from her father, but it was strongly urged that from the time of his death to the end of suit

A, a period of five years, she was in joint possession with her co-heirs of the mouzah which was the subject of suit A, and must therefore have received profits, which she was bound to account for. It is sufficient to say that their Lordships can discover no clear and definite proof, either in suit A, or in the present suit, that this was so; and the Courts below having assumed to the contrary, it is impossible their Lordships can now, for the first time, find the fact of such possession.

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The case is thus reduced to a question of procedure, viz., whether it was competent to the respondent to bring the present suit. The appellant's contention is founded on s. 11 of Act XXIII of 1861, which, among other things, enacts that "any question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by a separate suit, and the order passed by the Court shall be open to appeal." This enactment was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation. They therefore feel bound to say they are unable to assent to some of the reasons on which the High Court have founded their judgment. They cannot concur in the general proposition that a party sued in a representative character is not a party to the suit within the meaning of s. 11 of the Act of 1861, which is, as the Chief Justice observes, to be read as part of Act VIII of 1859. The 203rd section of Act VIII makes express provision for the manner of execution in such cases: viz., (1) against the goods of the deceased person, and (2) in certain events against the defendant "to the extent of the property not duly applied by him, in the same manner as if it had been against the defendant." It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that under certain conditions his own private property may be attached and sold. It is true, that to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable, and proper to be ascertained in the suit in which the

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decree is made, during the progress of the execution proceedings founded upon such decree. It does not seem to their Lordships to follow that because all the provisions relating to execution cannot be applied to a defendant sued in a representative character, such a defendant cannot be regarded as a party to the suit, within the meaning of such of them as may be applicable to his case. It may be true that "cross-decrees" cannot be set off between parties to suits in different characters under s. 209; and that decrees cannot, in the first instance, be enforced by imprisonment against a party sued only in a representative character under s. 201. But it may be observed, that, in a case where there is a finding that the property of the deceased has not been properly applied, and when the decree under s. 203 may be executed against the defendant to the extent of the property wasted, as if it had been against him personally, there would seem to be no inconsistency in holding the clause relating to imprisonment to be applicable. In a case then, in which a decree has been properly passed, and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit, with respect to any question which may arise between him and the other parties relating to the execution of the decree, within the meaning of s. 11 of the Act of 1861. But their Lordships consider that there are other grounds upon which the judgment in the present case may be supported. In their view it is not satisfactorily established that there is an existing decree which warranted any execution whatever against the respondent. It has been already pointed out that the original decree was amended by the High Court on appeal by a decree directing Jumaee to be released from the suit altogether. This decree was obviously erroneous, for it is clear she ought not to have been released from the suit in her representative character as one of the heirs of Waris Ali, but only in her own personal capacity. The decree releasing her from the suit altogether was, as the Chief Justice observes, probably so drawn up by mistake. Still it was so drawn up, and it does not appear to have been ever formally set right. It is true that by the order of the High Court of the 8th July 1864, upon Jumaee's own

appeal against the order for sale of her private estate, the Court, by declaring that her liability under the decree as one of the heirs of Waris Ali extended only to such property as she might have inherited or received as such heir, implied and affirmed that she was liable to this extent. But this order was made, not on an appeal against the decree, but against the order of sale made in the execution proceedings. In point of form, therefore, the decree releasing her altogether was left standing; and although the mistake may have been in substance corrected by the order of the 8th July, that order was not acted upon by the present appellant; and, on the contrary, it was at his instigation, swept away by the subsequent proceedings above referred to. If that order had been acquiesced in and acted upon by the appellant, it might perhaps have been regarded as a virtual amendment of the decree, but even in that case the sale of the respondent's private estate, of which she now complains, could not properly have taken place under it. However, the appellant refused to acquiesce in it, choosing to rely on his strict right; and upon his objection that in point of procedure it was wrong and could not affect the orders of sale of the 5th October 1863, and of confirmation of the 15th March 1864, it was set aside, or at least declared to be without force. When, therefore, the appellant insists that the present suit is not competent, because the questions relating to the execution ought to have been determined in the former suit A, his objection, which relates only to procedure, may, their Lordships think, be properly met by the counter-objection that in point of procedure his own decree in suit A is ineffectual, as actually drawn up to support any execution against Jumace, and that the proceedings which may have virtually set it right, and warranted some execution, have lost all efficacy for that purpose by his own acts. Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorizing an execution against the respondent's estate; and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree.

Their Lordships therefore being of opinion that the decrees

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under appeal are substantially just, and that under the peculiar and exceptional circumstances of the case, Act XXIII of 1861 was not a bar to the suit, will humbly advise Her Majesty to affirm the decrees, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for appellant : Mr. Wilson.

Agent for respondent : Mr. Barrow.

P. C.*
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WOOMATARA DEBIA (PLAINTIFF) v. UNNOPOORNA DASSEE AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Act VIII of 1859, s. 2—Res Judicata—Costs of several Respondents.

Where a party, failing to obtain judgment for the possession of land claimed by her in her first suit as *taufir*, brought a fresh suit claiming the land as property belonging to her talook according to the true boundary line, *held* that her suit was barred by s. 2 of Act VIII of 1859.

Where respondents were in the same interest, but severed in their defences, only one set of costs was allowed, and that to the respondent who first entered appearance.

THIS was an appeal from a decision of a Division Bench (Phear and Hobhouse, JJ.) dated 2nd December 1868 (1).

The following were the facts of the case:—On the 1st of April 1820, one Sunkoree Dassee, as zemindar of Hateahghur, granted a perpetual lease of 1,002 bigas of jungle and other land to one Ramsagor Mitter. There were two portions; the first containing 351 bigas, and the other 651 bigas. In 1824 a dispute arose between Sunkoree Dassee, who had granted the pottah, and Pran Kishen Dutt and Hurry Mohun Takoor as to the right of possession to the property, and a possessory suit between them was, on the 18th March 1826, decided in favor of the two last-mentioned parties, who thereupon ejected Ramsagor Mitter

*Present:—THE RIGHT HON'BL SIR J. W. COTVILLE, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR L. PHEL.

(1) 2 B. L. R., A. C., 102.

from the premises. He thereupon, on the 20th February 1828, brought his action against the contending parties on the ground that, however was the owner, he was entitled to be recognized as tenant. The defendants to that suit having put in their answers, Radha Kishen Dutt intervened and claimed, to have obtained from Government a pottah of the lands in question, and that they belonged to him. That potta, which was dated 5th February 1830 (24th Magh 1236), was a grant of certain waste land in the Soonderbuns of Bengal, by Government, to Radha Kishen Dutt, the land being rent-free for twenty years, and subsequently to bear an increasing rental rising to eight annas per biga. The grant was of 2,72,000 bigas, and it appeared by an endorsement on that grant that it comprised lots Nos. 30, 32, 33. No order was passed upon the claim of the intervenor, but a decree was, on the 1st February 1837, made to the effect that Ramsagor Mitter having been the cultivator, he should continue in possession, paying rents to the defendants in that suit. By the time that that decision was given, Ramsagor Mitter had died, leaving has his heirs, Woomatara Dutt and Ishan Issree, the former of whom being an infant, was represented by his father Hurish Chunder Dutt as his guardian. In accordance with this decree an ameen proceeded to the place to define the boundaries; a complaint was, however, made that such boundaries were wrongly placed on land comprised in the grant held by Radha Kishen Dutt, and a reinvestigation was directed, whereupon an agreement dated February 1840 (17th Magh 1246) was made by way of compromise between Hurish Chunder Dutt as representing the estate of Ramsagor Mitter and Cally Doss Dutt and Neil Madub Dutt, the heirs of Radha Kishen Dutt as to the boundaries of such portion of the land covered by the potta from Government to Radha Kishen Dutt as was comprised in the potta which had been granted to Ramsagor Mitter, the boundaries being set out at length. That compromise was filed in Court, and possession was given to Hurish Chunder Dutt, as guardian aforesaid according to the terms thereof. It appeared that, being in possession of this land Hurish Chunder Dutt in the same month of February 1840 executed in favor of one Doorga Persaud Mozoomdar an agreement

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to hold the land under him, and that he paid rent to Doorga Persaud, and subsequently to the now appellant, till the year 1851. In the beginning of 1852, a dispute arose between the now respondents (or the person whom they represent) as holders of the potta of lots Nos. 30, 32, and 33, granted to Radha Kishen Dutt, and the appellant and other persons jointly interested with her, as to the boundary of those lots and of the appellant's zemindari. This dispute resulted in a decree of the Deputy Collector to the effect that the property held by Hurish Chunder was comprised in the appellant's zemindari so far as 220 bigas 2 katas were concerned; this order which was passed on the 28th February 1852, was affirmed by the Superintendent of Surveys on the 25th June 1852. On the 28th April 1853, those proceedings being brought on appeal to the Revenue Commissioner, he set aside the order, and directed a survey to be made so as to include 7,389 bigas 7 katas 12 chittacks in the appellant's property of Shahazadapore *alias* Jurdewane village, and the residue as part of the Soonderbuns. On the 11th November 1853, the Superintendent of Surveys undertook the survey, and having issued the usual notices, made the following order :—

“Whereas, both the parties being aware of the aforesaid notice have not pointed the boundary of their respective estate within the time limited therein, it is necessary to fix the proper boundary by the Court, in compliance with the order of the revenue Commissioner. It appears that the land appertaining to the lots of the petitioners is situated undisputedly on the north of the aforesaid village at eastern corner on the further side of the boundary; hence, if at the said corner a line be clearly drawn from the khal above pillar No. 175, directly to pillar No 33, in the survey map of the aforesaid village, 7,389 bigas 7 katas and 12 chittacks of lands will remain as part and parcel of the above mouzah, and the remaining land will be included within the Soonderbuns as directed by the Revenue Commissioner. It is therefore order for the reasons recorded as above, that a green line be drawn from the khal above pillar No. 175) directly to pillar No. 33 in the survey map; that it be forwarded to the Revenue Commissioner with an English letter for the purpose of having the lands demarcated as above to be clearly expunged from the map of the compass book, and to be included within the aforesaid lots of the Soonderbuns. Let it be known that, after the map prepared by means of the compass being

rectified, the boundary line will be demarcated in the mofussil by an ameen according to the said line."

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The boundaries having been laid down, disputes arose as to 1,500 bigas of land, and an Act IV of 1840 case was in April 1854 instituted by the respondents against the appellant and others, which, after being decided by the Magistrate against the respondents, was by the Commissioner on the 26th July 1854 decided in their favor, and the respondents were maintained in the possession of those 1,500 bigas, the appellant being left to seek relief in a regular civil suit.

On the 15th September 1854, the appellant, together with other persons claiming jointly with her, filed a plaint in the Court of the Principal Sudder Ameen of the 24-Pergunnahs against all the respondents save Government as grantees of lots Nos. 30, 32, 33, and against the Government as superior landlords of the Soonderbuns, and Hurish Chunder Dutt as guardian of the infant lessee.

That suit was to recover 3,200 bigas which included the lands so let to Ramsagor Mitter as hereinbefore mentioned. The plaint went into a detailed statement of the various proceedings above-mentioned, and found fault with the decisions of the Revenue Commissioner and of the Sessions Judge, and it concluded thus:—

"Wherefore praying to set aside the survey map of the said mouzah dated the 31st January 1852, to remove the pillars posted in the midst of the same, and to set aside the Act IV award, passed the Sessions Judge relying on the same, we institute the suit in the names of the defendants, to recover possession of the above 3,200 bigas of lands as per boundaries, &c."

By an amended plaint, the land claimed was described as being 5,000 bigas, and the boundaries were given.

The Government put in an answer denying the right of the plaintiffs to the lands claimed.

The other defendants, respondents, also put in answers denying the plaintiffs' right.

The Judge dismissed the suit and ordered that the boundary between the talook and lots should be settled as fixed by the

1872 Commissioner. The following are the material portions of his judgment :—

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"The present action has in view to extend Shahazadapore to the eastern boundary of the lot No. 32 itself but this is totally admissible.

"All that the talookdar of Shahazadapore could claim, he claimed at the Special Commissioner's Court when he went up in appeal, and according his 4,899 bigas were separately demarcated, and a distinct settlement made with him at the time, he executing a *doul* under which he holds that mehal No. 425, No. 2, which is entered as such upon the *tauji*. The claim now extends to other 3,200 bigas. The claim should have been preferred simultaneously with that for the 4,899 bigas."

On the 10th April 1865, the appellant filed her plaint in the suit now under appeal.

To this she made as defendants the respondents including the Government.

The essence of her plaint was that her talook was by a survey map, No. 13 of 1852, found to comprise over 8,462 bigas, and that the Revenue Commissioner, on the 29th April 1853, ordered that all land in excess of that contained in the appellant's *doul* (estimate) (7,389 bigas) should be included in the respondent's land; that accordingly the Superintendent of Surveys drew a green line on the survey map from a pillar No. 175 directly northward to pillar No. 133, and ordered the 1,073 bigas to be included in lots Nos. 30, 32, 33; that according to this the respondents in 1854 took possession of lands rightly belonging to her; that by a survey made in 1858-59, and the settlement made by the Soonderbuss Commissioner of Revenue on the 24th November 1852, she had only 6,611 bigas 17 katas 2 chittacks in her possession, and that the respondents had dispossessed her of the remaining 777 bigas 10 katas 9 chittacks, and she claimed as from that date (24th November 1852), title to these 777 bigas 10 katas 9 chittacks, in order to make up her full amount of 7,389 bigas 7 katas 12 chittacks.

The Government put in an answer to the suit, of which the following is an analysis :—

1. That by the proceeding of the Commissioner of Revenue of 29th April 1853, the talookdar was declared not entitled to

more than 7,389 bigas 7 katas 12 chittacks settled with her in 1834, and an order was passed to define her area by survey measurement.

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2. That in executing such order, a dispute arose between the appellant and the lotholder as to 1,500 bigas, which was in an "Act IV of 1840 case" decided against her, and she brought a regular suit for 5,000 bigas against the lotholder which on the 16th June 1857 was decided against her.

3. That in accordance with the rules of September 1853, a survey was made in 1858-59 of lots Nos. 30, 32, 33, by which it appeared that the lots contained 36,435 bigas, of which 6,611 bigas were in the possession of the talookdar, and that out of the remaining 29,822 bigas, 1,640 were in dispute, as being within the boundaries of Talook Shahazadapore.

4. That the disputed lands not being claimed, the 29,822 bigas in the possession of the lotholders were settled with them in November 1862, under Regulation VII of 1822, the party dissatisfied being left to sue in the Civil Court.

5. That as to the plaintiff's allegation of the cause of action survey in 1858-59.

The other respondents, on the 19th June 1865, also put in a written statement claiming the benefit of the law of limitation on the ground of their being in possession of the disputed land since the granting of the Government pottahs in 1236 (1829), and, relying upon the fact of the appellant having already sued unsuccessfully in the former suit for the same property, submitted that the suit was barred by the Act VIII of 1859 s. 2.

On the 9th March 1866, the Court ordered an ameen to make a local investigation, and that ameen, having heard the evidence, inspected the place, and prepared a map on the 5th May 1866, reported that the disputed land was within the boundaries of the land sued for in the former suit. On the 14th March 1867, a further local enquiry was directed and was taken up by another ameen, who, after examining the witnesses, and comparing the maps with the property, and making a new map, came to the same conclusion. Both of these ameens were examined on solemn affirmation by the Principal Sudder Ameen and

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verified their reports. The Principal Sudder Ameen having considered the oral and documentary evidence, on the 7th November 1867, gave a decree dismissing the appellants suit.

In his judgment given in support of the decree, the material parts are here set forth :—

“ I proceed now to enquire whether the lands claimed are those for which a previous suit had been brought by the plaintiff. I think there can be no doubt that they are the identical lands for which plaintiff had sued before, and for which thereto the parties litigated had been an Act IV case, as the boundaries given of the 1,500 bigas, for which under Act IV fully prove them to be so ” (1).

He then set out the boundaries of the lands claimed in this and in the former suit in detail, and proceeded thus :—

“ A comparison of these boundaries with those given by the plaintiff in her former suit leaves very little doubt that the lands now claimed are a portion of those for which plaintiff had sued before, and this as been furthermost distinctly deposed to by the Chukdar Woomachurn Dutt both before me and the second ameen deputed by order of my predecessor, Baboo Grish Chunder Ghose.

“ The disputed lands being thus proved to be the lands for which plaintiff had sued before, and which resulted in the dismissal of her suit, it is clearly barred by s. 2, Act VIII of 1859.

“ Plaintiff’s pleader, however, urges that, even if it to be decided that her lands now claimed are the lands for which plaintiff had sued before, the present action cannot still be barred, inasmuch as it is brought on a ground totally different from that on which her former action was founded, namely, that the plaintiff in the previous suit claimed the land as *taufir* or excess land of her Talook Shahazadpore, whereas she now claims them as part and parcel of the lands of her talook.

“ To this argument the defendant’s pleader, Baboo Aashootosh Mookerjee, replies that the same evidence upon which plaintiff relied in her former suit has also been adduced in this case, and the parties also being the same, the case cannot be taken out of the operation of the doctrine of *res adjudicata*. Admitting, for argument’s sake, the validity of the plaintiff’s pleader’s argument that the action is founded on a separate and distinct cause of action, still I find no proof of the lands sued for being part of plaintiff’s Talook Shahazadpore, or that she was in possession of the same, and has been dispossessed. The greenline of the thakbust may being the admitted eastern boundary of Shahazada-

(1) *Sic* in the printed book before the Privy Council.

pore, and the lands claimed being clearly situated beyond that boundary, plaintiff by her own admission has no right to them."

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The plaintiff then appealed to the High Court, but the appeal was on the 2nd December 1868 dismissed with costs by a Division Bench (Phear and Hobhouse, JJ.) (1).

The plaintiff then appealed to Her Majesty in Council, and an appearance was entered by and a case lodged on behalf of the Government separate from the other respondents.

Mr. *Doyne* for the appellant.—It is a mistake to construe section 2, Act VIII of 1859, as applying to this suit. No doubt, the land now in suit is a portion of the land sued for in the former action, but there is no identity of the causes or cause of action in the two suits. There has been no previous determination of the present cause of action—*Modhoo Ram Dey v. Boydonath Doss* (2). Although she could not establish her right to the land as *taufir*, there is no reason why she could not show a title to it is improperly excluded from her boundary line. A man may sue another for damages as trespasser, and failing, may bring a fresh suit against him for rent as tenant—*Kadir Buksh v. Golam Ali Gomashtah* (3). The subject matter may be the same, but the cause of action very different. The principal is correctly laid down in *Shama Purshad Roy Chowdhry v. Hurro Purshad Roy Chowdhry* (4), where Lord Justice Turner lays down the rule. *Hunter v. Stewart* (5) shows that the question is whether the evidence in such suit would be the same. The lands in suit were clearly in possession of the appellant up to 1854 and formed part of Shahazadapore, and under any event the appellant is entitled to the strip of land between the green line and the present boundary of Shahazadapore. If she be deprived of this land, she is clearly entitled to compensation from the Government in this suit.

Sir *R. Palmer*, Q. C., and Mr. *J. D. Bell* for the respondents except the Government.

(1) 2 B. L. R., A. C., 102.

(2) 9 W. R., 592.

(3) *Id.*, 90.

(4) 10 Moore's I. A., 203; see 311.

(5) 31 L. J., Ch., 346; see 350.

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Mr. Forsyth, Q. C., and Mr. Pontifex for the Government.

The case of *Srimut Rajah Mootoo Vijaya Raganadha Bodha*
Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar (1)
was relied upon.

Their LORDSHIPS delivered the following judgment :—

Their Lordships propose to dispose of this appeal upon the only point that was dealt with by the High Court, namely, whether the present suit can properly be brought consistently with the second section of the Act of Civil Procedure. That clause is in these words :—“ The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.”

The first question that occurs to their Lordships upon that section is, what is meant by the cause of action? And in the present case they are clearly of opinion that the cause of action in both suits was the dispossession of the appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV case. The result of those proceedings was to affirm the possession of the defendants in the land which was the subject of the first suit, and to leave the party who felt aggrieved by them to her remedy by a civil suit.

The first suit was accordingly brought, and in the present suit both Courts have found, and it has been fairly admitted at the bar, that the land, which is now in dispute is a portion of the land which was then sued for. The identity, therefore, of the subject-matter of the two suits is admitted, and, as their Lordships have already said, the cause of action in both was the dispossession of the appellant by reason of the proceeding then taken.

It is sought, however, to distinguish the case upon the ground that the appellant, who was the plaintiff in the former

(1) 11 Moore's I. A., 50,

suit, saw fit in that suit to admit that no portion of the land then said for was included within the limits of Talook Shahazadapore, as originally settled and defined by the *doul*, but that she had as talookdar of that talook acquired title to it as *taufir*, that is, that by gradual squatting or encroachment, she had enlarged the boundaries of her talook, and by bringing the land into cultivation had acquired a preferable right to have the settlement made with her.

Now, it is perfectly clear to their Lordships upon the proceedings that the real question in issue to be determined between the parties then was whether the lands then sued for, which included the lands now sued for, belonged as of right to the talookdar, or whether they fell within lot 32, which belonged to the defendants? and it was open to the plaintiff, the present appellant, in the former suit to shape her title in either of three ways. She might have said; as she did say, according to Mr. Doyne's argument to-day, that the whole of the land then claimed was *taufir* land; or she might have said, a portion of the land fell within the talook as originally settled and formed part of the 7,000 odd bigas mentioned in the *doul*, and the residue of it is *taufir* land; or she might have put her case in the alternative, and have said that she had a good title to a portion as her original land, but that should the proof of that fail, that portion also was to be considered as *taufir* land.

With the full knowledge of all the circumstances, she chose to say:—"I admit that I am in possession of all that I was entitled to under the *doul*, but I claim this land, the whole of it, as *taufir* land." The contention now is that, although she saw fit to take that course then, she has now a right to fall back upon the other title, and to say:—"The boundary was improperly drawn, so as to include in the defendants' holding that which of right should have been within my originally settled talook, and, as I now claim in that way that which I might have claimed in the former suit, I am not precluded from bringing this second suit." It appears to their Lordships that that contention cannot prevail against the clear terms of the section in question, or indeed upon principle.

It is clear that it does not fall within the principle of the

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decision given by Lord Justice Turner at this Board upon the earlier Regulation in which he takes the distinction that the Regulation "was only to prevent the retrial of the same question," and that it was not intended to apply "to cases like the present, in which new circumstances had intervened and altered the nature and character of the questions to be determined." Here no new circumstances at all have intervened.

Nor does it appear to their Lordships necessary to decide whether in some of the cases put by Mr. Doyne, where the party was suing entirely under a new and a different title, such a distinction as he contended for might not be taken; because here it seems to their Lordships that the matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit that her right in any way to this land was capable of being therein determined. The Court in that suit seems almost to have considered that the title now sued upon had been put forward and could not prevail; and that if the talookdar had any title at all, it was by way of *taufir*.

The Court of Appeal, proceeding on the admission of the plaintiff that the whole of the originally settled talook was in her possession, and that all she had been dispossessed of was claimed by her only as *taufir* lands, dealt with that claim; but it is perfectly clear that, if the plaintiff had chosen to put forward the other title in the way I have suggested, the Court would have dealt with the whole question and considered it, that question being in point of fact a mere question of quantity and boundary, and whether the plaintiff was in any way entitled to recover the lands sued for from the defendants, who are the defendants also in the present suit.

It therefore seems to their Lordships that the case really falls within the principle and letter of the section in question, which has been properly decided to be a bar to the suit.

They think it desirable to remark that the principle upon which their decision in this case proceeds seems to be almost identical with that laid down in a judgment delivered by Lord

Westbury in the case of *Kattama Natchiar* (1). In that case a party had brought a suit, claiming under a will, having, as defendant in a former suit, abandoned his title under that will, admitting that the will did not amount to a devise and resting his title upon the issue whether the estate was separate or undivided, and Lord Westbury said:—"That being the state of the case we, are now called upon to approve of a suit subsequently instituted by the very person who had deliberately given this character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He in effect stated or, might have stated his defence in the suit of 1856 in the alternative. He might first have insisted that it was an undivided property, and that therefore the plaintiff in those suit had no interest therein; and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favor. When a plaintiff claims an estate and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward. The present appellant might have insisted on the validity of the alleged will; but instead of doing so when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed."

The present case is even stronger than that referred to inasmuch as in the latter the party was a defendant in the first, and plaintiff in the second suit, whilst the appellant is plaintiff

(1) 1 Moore's L. A., 50; see 72.

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in both suits, and as such had in both the means of shaping her case as she chose.

Their Lordships, therefore, entirely concurring with the judgment delivered by Phear, J., in the High Court, are of opinion that this appeal must be dismissed. It is possible that the appellant has lost what she might have been entitled to ; but it she has lost in, the loss is entirely the result of her own mode of dealing with her case in the former suit.

Their Lordships have only further to observe that the appeal must of course be dismissed with costs, but that the ordinary rule of this Board is to give only one set of costs to the respondents in the same interest. We have not had an opportunity of knowing why there has been a severance in defence, or whether there are any special grounds why that rule should be varied.

After some discussion at the bar on this point, SIR JAMES COLVILLE said :—

Their Lordships see no ground for departing from the general rule of allowing but one set of respondents' costs ; and considering that those represented by Sir Roundell Palmer were first in the field, and had entered their appearance first, their Lordships think that the Collector as Court of Wards and representing the infant defendant, would sufficiently have discharged his duty, and have exercised a sound discretion, if, seeing that the suit was to be substantially defended, he had left the defence in the hands of the other respondents ; or, at most, had applied for leave to join in their case. Their Lordships do not think that there was a necessity for his increasing the costs by coming forward as a separate respondent. Their Lordships therefore think they ought not, in justice to the appellant, to do more than give one set of costs, and that they ought not, in justice to the principal and original respondents, to deprive them of any part of their costs.

Appeal dismissed.

Agents for appellant : Messrs. *Watkins and Lattey*.

Agent for respondents except Government : *Mr. Barrow*.

Agents for Government : Messrs. *Lawford and Waterhouse*

**SREENARAIN MITTER (DEFENDANT) v. SREEMUTTY KISHEN
SOONDERY DASSEE (PLAINTIFF.)**

P. C.*

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[On appeal from the High Court of Judicature at Fort William in Bengal.] Nov. 5. 6.

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Jany. 15.

*Act VIII of 1859, 15—Declaratory Decree—Defendant—Guardian—
Minor—Adoption—Sudras.*

A declaratory decree cannot be made, unless the plaintiff would be entitled to consequential relief if he asked for it. It is discretionary with a Court to grant a declaratory decree, and the Courts in India ought to be most careful in exercising such discretion.

A, widow of a Hindu, sued B as father and guardian of C to have it declared that the deeds executed by A and B, one of giving C in adoption, the other of receiving him in adoption, were null and void, on the ground that they were agreements to give and take in adoption, and that B did not give his son according to agreement. Held (reversing the decision of the Courts below) that such suit was not maintainable.

Quæ.—Whether religious ceremonies are necessary to make an adoption valid among Sudras?

See also
15 B. L. R. 78.
15 B. L. R. 99.
13 B. L. R. 227
13 B. L. R. 403

This was an appeal from a decision of the High Court (Norman and E. Jackson, JJ.), dated the 5th March 1869 (1).

The suit was brought by the respondent against the appellant for himself and as guardian of his minor son, Noggendro Chunder, Mitter," to "set aside two deeds for the adoption of a child executed on the 30th Jaishta 1271 (11th June 1864) by both parties, and to throw off the burden which was on the plaintiff in consequence of those deeds."

The respondent was the wife of one Dwakanath Ghose, a Sudra. He had no male issue, and before his death he gave the respondent permission to adopt a son to him. The appellant had a son named Noggendro Chunder Mitter, and towards the end of Jaishta 1271 (June 1864) he went with his son to Bhimgulpore, where the respondent resided.

On the 30th Jaishta 1271 (11th June 1864) at Bhimgulpore, the appellant executed a deed of *danpatra*, or giving in adoption, and the respondent executed a deed of *grahanpatra*, or taking in

*Present:—THE RIGHT HON'BLE SIR JAMES W COLVILLE, SIR BARNES PEACOCK, SIR
M. E. SMITH, SIR R. P. COLLIER, AND SIR LAWRENCE PEARL.

(1) 2 B. L. R., A. C. 279.

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adoption, of the said Noggendro Chunder Mitter. Both documents were registered, and were taken from the Registration office to one Luchmeenarain Singh, who theneforth kept them on behalf of the appellant until they were filed on behalf of the respondent in this suit.

The material portion of the deed of *danpatra* was as follows :—

“ I have willingly given in adoption my second son Noggendro Chunder Mitter by my third wife Sreemutty Monmohinee under the altered name of Shoshee Nanth Ghose. The said male child with whom henceforth I have no right at all according to *shastras*, and who has thus become divested of *gotra* (lineage) appertaining to my family, and being equal to the son of your body, has thus become vested with the family rights and *gotra* appertaining to your husband's family under the name of Shoshee Nanth Ghose, will discharge or perform all the secular as well as all the religious duties of your husband's family, and will be the owner himself and his heirs for ever of all your husband's property, namely, his zemindari, and all immoveable as well as moveable property, and lands paying rent or rent-free, which stand in his own name or in *benami*, and which exist at present, or may hereafter be acquired. For this effect, I have executed the deed whereby the child is given in adoption with the following respectable witnesses, that it will prove efficacious in future.”

The deed of *grahanpatra* executed by the respondent was as follows :—

“ This is a deed of adoption. My husband, the late Dwarkanath Ghose, died without issue, leaving me his heiress on the 30th June 1863, corresponding to the 17th Assar of the year 1270. My husband, in consideration of his having no issue in his life-time, gave me permission to adopt a son for the due performance of the funeral rites of himself and of his ancestors, paternal and maternal, and of myself, and for the due observance and continuation of the religious ceremonies and other ancestral duties, and the other rites and ceremonies peculiar to his family, and fitted to his social position, and for the care of his property, &c., and for the preservation of his name and honor, had expressed his desire that the son so adopted might be the exclusive proprietor of all his property and zemindaris, and that none else might have any right or title to his property. At present, in obedience to the aforesaid injunctions, and with the unanimous consideration and opinion of myself and my near relations and members of the family, knowing you to be my sincere and faithful friend, and believing that by means e

your respectable family, the objects aimed at by myself and my husband will be realized, I do, with the prescribed rites and ceremonies, adopt as my son, Noggendro Chunder Mitter, your second son by your third wife, Sreemutty Mohmohinee. The said Noggendro Chunder Mitter has thus become divested of all the rights and *gotra* appertaining to your family, and has become vested for ever with the rights and *gotra* of my husband's family under the name of Shoshee Nauth Ghose. By virtue of which he, having become equal to the son of my body, is become the owner himself and his heirs of all my husband's ancestral and self-acquired property which stands in his own name, or *benami*, namely, zemindari and lands, rent-paying, as well as rent-free, and gardens, &c., and all the moveable and immoveable property, &c. He will henceforth perform, in the manner described above, the funeral rites, &c., of myself and my husband and of his (my husband's) paternal and maternal ancestors, and shall also perform the religious and family rites and other duties for ever. During his minority, I, his mother, shall take care of all his property."

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It appeared from the evidence that the child Noggendro Chunder Mitter was present at the respondent's house at the time when the documents were being drawn up, and remained there four days, and then went away; and from a letter addressed to the appellant by Soorjonarain Singh, the brother and manager of the respondent, under date of the 6th Aswin 1271 (21st September 1864), it appeared that the child (therein described by his adoptive name) had been sent again to the respondent's house at Bhaugulpore, and was to be put to school there.

Several letters passed between the appellant and Soorjonarain Singh, who wrote as manager on behalf of the respondent, from which it appeared that there was a difficulty in getting the adopted child to go again to the respondent's house, inasmuch as he preferred staying with the appellant, his natural father. In particular, the said Soorjonarain Singh wrote a letter to the appellant, dated the 15th Aghran 1271 (29th November 1864), from which the following is an extract:—

"Because Noggendro Chunder did not go along with cousins Gopendro Chunder Mitter, &c., the females have been displeased; but on a consideration of the following circumstances, you will do as you think proper. All the members of the family here think that, if an adopted son does not acquire a due affection for the place where he is brought

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by the adopting party, it is all the same whether he is adopted or not; and if during infancy, an adopted son frequently goes and comes, he cannot imbibe such affection for the adopting parties. Under such circumstances, going and coming frustrates the main object of adoption; and in future it is likely that disorder and discord might happen. I do not think that the inference of the people here is utterly groundless, for when I went home, some leading men of that part of the country praised your affectionate conduct, and had expressed the same opinion in respect of going. I see that, if he does not go according to your wishes, you may be displeased. Both are difficulties to me; if you are mortified, it is painful and sinful to me, and if matters do not proceed according to the wishes of the people here, I shall have to bear shame and reproach in the same way; and if, on account of going, or for any other cause, the cousin were not to contract affection, and were in future to do an unpleasant act, then there will be no end of censure both to you and me. It cannot be said whether we shall be living by that time; but whether we live or not if such conduct were to take place, we will be held up as examples. I consider you in the light of a father, therefore on consideration that in future there may be no room for blame attaching to me or you, you will settle what should be done. The people here blame me, and will go so far repeatedly urging to go; and if he does not go, you will be displeased. The aforesaid cousin is at present in peace of mind here. There is no likelihood of his being disconsolate. Therefore, if he does not go frequently, then he will not be aggrieved. It is true that by remaining here, your mind and that of the family will be uneasy; but if you don't bear this, everything else will not be in harmony; and if you do not agree to this, then you will consider what is proper in every way. In this respect the uneasiness I am under cannot be described by me in writing. I have placed you in this dilemma by falling into a gross error. Settle what is proper and expedient in every respect."

On the 16th Magh 1271 (28th January 1865), the appellant wrote to the said Soorjonarain Singh a letter, from which the following is an extract:—

"The reason why Sreeman Bahajee (the beloved and fortunate one) feared going there and clearly declined proceeding at present will be told you verbally. When a child becomes obstinate what can be done, therefore do what is good in prospect of the future."

Again, on the 13th Chaitra 1271 (25th March 1865), the appellant wrote as follows:—

"PROSPEROUS AND AFFECTIONATE.—Noggendro Chunder Mitter is weak, and is therefore constantly uneasy. He is entirely unwilling to go there. In this I have no power, as I have already stated in my former letter. I now positively inform you that you will, relinquishing that hope, in consideration of the future, certainly make *dattagrahan* (or take a son into adoption), or any other arrangement you think proper for the preservation of the estate."

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It appeared that the appellant subsequently was advised that the instruments of the 30th Jaishta 1271 (11th June 1864) did amount under the circumstances to a complete adoption, for under date the 10th Chaitra 1272 (22nd March 1866), he wrote to Soorjonarain Singh as follows :—

"I have no power to cancel the adoption of the son who has been already adopted, and I need not talk anything about it, therefore I must remain silent."

On the 27th April 1866, the respondent through Soorjonarain Singh caused the following letter to be written to the appellant :—

SIR,—Under instructions from Baboo Soorjonarain Singh, agent on behalf of Sreemutty Kishen Soondery Dassee, widow of the late Mohashoy Dwarkanath Ghose, of Chowke Nyamutpore, in the Pergunnah and Zilla Bhaugulpore, I do hereby give you notice that on the 30th Jaishta 1271 B. S. (11th June 1864), you entered into a contract in writing, agreeing thereby to give your son Noggendro Chunder Mitter in adoption to the said Sreemutty Kishen Soondery Dassee, and she, in return by a similar instrument of the same date, promised to take your boy in adoption, but the ceremonies necessary to complete it were not performed. On the 30th of Chaitra you refused to fulfil your contract by a letter addressed to Baboo Soorjonarain Singh, as also you manifested similar feelings in other letters and in conversations held between yourself and her agents.

"In consequence of your unwillingness to complete the adoption, my client called upon you to execute another instrument, cancelling the aforesaid mutual agreements, both verbally and by letters, to which you replied orally, as well as in writing, that you would act in a manner that would suit the purposes of my client. Now that repeated applications have been made to you on behalf of my client either for the fulfilment of the original written agreements, or for the execution of another instrument in supersession of the former ones, and not having

1872-73 adopted either of the courses required of you, I hereby give you notice
 SREENARAIN that my client is prepared 'to institute such legal proceedings against
 MITTER you as she may be advised."

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Except the letter of the 10th Chaitra 1271 (22nd March 1866), no letter, such as alluded to in that communication, was put in evidence.

The respondent filed her plaint on the 31st May 1866, in which she treated the instruments of the 30th Jaishta 1271 (11th June 1864) as only agreements to give and take in adoption, and she alleged that the appellant did not give his son, and that the current form of adoption had not been complied with, and she went on to say that, as she deemed it proper before making an adoption as a necessary precaution to have the permission of the Court, in respect of her right of adoption of another son in cancellation of the agreement therefore the suit was preferred.

The appellant, by his written statement, contended that the permission (meaning the declaration of right), which the respondent asked in the suit could not be obtained, and in substance contended that his son had been adopted by the respondent after the completion of the necessary rites and ceremonies. The appellant also denied that he had ever made any promise to the respondent with a view to set aside the *dattakpatra grahan-nama* of 30th Jaishta 1271 (11th June 1864), and he alleged that the child did sometimes live in the house of his adopted father.

The following were the principal issues settled by the Principal Sudder Ameen :—

"2nd.—Can there be a suit for a declaration of a right to adopt?"

"3rd.—Was the adoption of the child complete or not, that is, whether the requirements of the Hindu law were carried out, or the gift was not complete, and the child not made over?"

"4th.—Whether the defendant refused to make over the child to the plaintiff or not?"

"5th.—Is mere agreement to make and receive a child in adoption sufficient to preclude one from adopting another child, when the child agreed to be adopted is not made over?"

The Principal Sudder Ameen held that the suit was not a merely declaratory suit and was maintainable; that the performance of ceremonies was essential to constitute a valid adoption;

that no such ceremonies had been performed in this case ; that there was neither gift or acceptance of the boy in adoption ; and that it had " been established that the deeds were void for want of due delivery." He therefore gave a decree for the plaintiff. The following portions of his judgment and the terms of the decree which are referred to in the judgment of the Lords of the Judicial Committee were as follows :—

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"It is true that the language of the instruments conveys the idea that there was gift and acceptance, as well as completion of ceremonies ; but as the plaintiff denies them in *toto*, a judicial determination on these points becomes necessary. It has been already established that the ceremonies were not performed ; therefore, it remains to be seen whether there was formal gift and acceptance of the boy, as well as due delivery of deeds. If the witnesses of the plaintiff are to be believed, and I see no reason to doubt their veracity, from their respectable position neither was there gift or acceptance of the boy, nor due delivery of the deeds. The witnesses for the defence have broken down as already observed ; therefore I place no reliance upon what they have said.

"Summing up, therefore, what has been stated above, it is clear that there has not been a due performance of the ceremonies, and the effect of the deeds was that it was agreed that the child should be made over for adoption, but the defendant has not done what he was required to do, namely, to hand over the child to the plaintiff ; it is, therefore, ordered that the suit of the plaintiff be decreed, and she be declared to be not bound by the deeds dated the 30th Jaishta 1271 (11th June 1864), which are also declared cancelled and inoperative. The costs of the plaintiff to be paid by the defendant."

The terms of the decree were as follows :—

"It is ordered that this case be decreed, that the female plaintiff may not be required to observe the documents of 30th Jaishta 1271 (11th June 1864), which have been declared null and void, and that the costs of the female plaintiff be paid by the defendant."

"Among the grounds of appeal which were filed by the defendant (now appellant in the Court of the Judge of Bhangulpore from the last-mentioned judgment were the two following :—

"4. That in consideration of the nature of the plaintiff's case, that is, when the plaintiff brings the suit after admitting the execution of the

1872-73 two absolute and unconditional deeds of gift and acceptance, viz.,
 SREENARAIN *dattalegrahampatra* and *dattakdanpatra*, which prove clearly the
 MITTER completion of the adoption in question, the entire *onus* of proof is on
 v. the plaintiff to establish satisfactorily her own allegations, and to rebut
 SREEMUTTY the effect of those documents; but from the lower Court's judgment
 KISHEN it is quite evident that it has taken a wrong or an opposite view of
 SOONDERY the case, and in consequence justice has miscarried.
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"6. That according to Hindu law, the Court below is wrong in supposing that more ceremonies than the actual giving and receiving of the child are necessary and essential for the completion of a *Sudra* adoption. The non-observance of any other ceremony does not invalidate a *Sudra* adoption, as will be borne out by Hindu law and decisions."

"7. That, from the judgment of the Court below, it is clear that it has considered adoption in general, and not a *Sudra* adoption only which was the sole point for contention in this suit.

"14. That the Court below was wrong in deciding that the delivery of the child, and of the two primary documents, were not proved, inasmuch as there was sufficient satisfactory evidence in the case to establish the same."

The Additional Judge dismissed the appeal with costs. The following are the material portions of his judgment which are referred to in the judgment of the Lords of the Judicial Committee:—

"The subject of this suit is not the declaration of right to adopt, but the cancelment of two documents, and a declaration that they are void, owing to the non-performance of certain ceremonies. The Court is quite clear that such a suit can lie. English Equity Courts frequently cancel, rescind, or order delivery up of instruments which have answered the end for which they were created, or of instruments which are voidable, though apparently valid. This is done upon the principle of, as it is technically called, *quia timet*, that is, for fear that such instruments may be vexatiously or injuriously used when the evidence to impeach them may be lost or diminished, or for fear that they may throw a cloud or suspicion over the plaintiff's title and interests. That the Courts of this country have a similar power, there cannot be a doubt.

"*Secondly*.—It has been urged for appellant that respondent's claim should have been dismissed, because the plaint wrongly describes as promises to adopt absolute deeds of adoption. But this Court is clear that the said misdescription, inasmuch as it does not alter the cause of

action (as described above), but rather strengthens it, cannot cause the suit to abate. We now come to the merits of the case. The first point to be noticed is that the issue in this case has been unnecessarily widened. Appellant contended that ceremonies had been performed, and brought forward witnesses, who distinctly swear that not only the giving and taking but a number of other religious rites were performed. It was, therefore, quite unnecessary on the part of the lower Court to enter into the question of what rites are or are not essential to a Hindu adoption. If the defendant's (appellant's) witnesses are to be believed, not only essential but admittedly non-essential rites were performed. Defendant (appellant) must abide by the evidence which he adduces, and stand or fall with it. His virtual plea is that all or many of the ceremonies were performed. He cannot in the same breath urge that one only (that of giving and taking) was performed, and that one only is necessary to the validity of a Sudra adoption.

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"If the above view is correct, the simple issue in this case is, whether the ceremonies of adoption have been performed (as alleged by appellants) or have not been performed.

"The lower Court has found, after a careful inquiry and weighing of evidence, documentary and verbal, on either side, that no religious ceremonies of any sort were performed, and on the numerous grounds recorded in its judgment has expressed an opinion that the defendant's witnesses are not to be believed, whilst the plaintiff's (respondent's) witnesses are stating the truth when they say that no ceremonies have ever been performed. The lower Court also lays great weight on certain expressions used in a letter from the appellant, dated 13th Chaitra 1271 (25th March 1865), which contains, in the lower Court's opinion, expressions justifying the inference that, by the defendant's own admission, no religious ceremonies had been performed, and consequently no valid adoption had taken place. The question before this Court is whether the finding of the lower Court on the above question of fact is correct or not. If it is, the plaintiff's (respondent's) claim for cancelment of documents must be decreed, for it is admitted on all hands that an adoption deed is void in the absence of a religious ceremony or ceremonies.

"After a careful consideration of the evidence, both verbal and documentary adduced on either side, the conduct of the parties, and the various probabilities and improbabilities which have been brought to the notice of the Court by the Counsel on either side, this Court has come to the conclusion that there is no valid reason for disturbing the finding

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of the lower Court to the effect, that no ceremonies were performed, and that consequently the deeds of adoption filed in the case are null and void.

"The appeal, is, therefore, dismissed with costs."

The defendant then preferred to the High Court a special appeal on the following grounds :—

"1st.—If the suit is to be regarded as one for a declaration of the plaintiff's right to adopt, or to adopt a child other than the defendant's son, it is one disclosing no cause of action. If it is to be regarded as a suit to set aside a contract, it was wholly unnecessary, as the plaint shows that the alleged contract had already been rescinded by the defendant.

"2nd.—There is no allegation of any threat or intention on the defendant's part of enforcing his rights under the contract, but merely a statement amounting to this, that having once refused to carry out the contract and thereby rescinded it, the defendant did not rescind it again.

"3rd.—The plaint proceeds on the allegation of an original binding contract to give and take a child. Such a contract amounted to an actual gift and acceptance as do the two documents relied on by the plaintiff, and among Sudras nothing more was necessary than the gift and acceptance.

"4th.—If any ceremonies were essential, the legal effect and weight of the evidence showed that such had been performed, and such evidence could not be affected by the failure of the defendant's witnesses to prove the performance of other non-essential ceremonies.

"5th.—If the defendant has lost his right to enforce the contract, the plaintiff's rights are unaffected by it. If he had not lost his right to enforce the contract, the plaintiff could not sue to set it aside.

"6th.—Letters alleged to have been written by the defendant are admitted without legal proof.

"7th.—It is a mistake on the part of the Court below to suppose that it is admitted on all hands that an adoption deed is void in the absence of a religious ceremony or ceremonies."

The High Court (Norman and E. Jackson, JJ.), dismissed the appeal (1).

The defendant appealed to Her Majesty in Council.

Mr. Cowie and Mr. Bell appeared for the appellant.—No such

suit will lie. The suit is against the father, and although he issued as guardian, he was not guardian, his son never having been made a party. If it is attempted to be made out that a declaratory decree can be made, it is clear this is not so. To entitle a party to such decree, the plaintiff must be entitled to consequential relief if he asks for it—*Jackson v. Turnley* (1), *Rooke v. Lord Kensington* (2), *Kenaram Chuckerbutty v. Dinonath Panda* (3), *Puree Jan Khatoon v. Bykunt Chunder Chuckerbutty* (4), *Rani Anandkumari v. The Government* (5), and *Rajcoomaree Dossee v. Nobocoomar Mullick* (6). What consequential relief could be got here? If the deeds were declared cancelled, that could not set aside the adoption. An action might lie for damages against the father for not delivering over his son, but such a suit as this could never lie. The parties are Sudras, and the adoption was perfect by gift and acceptance. The deeds do not effect, but are evidence of, the adoption. The boy was fully and irrevocably taken over, and lived with the adopting mother. They cited Menu's Inst., p. 210, s. 168; Strange's Hindu Law, p. 83; *Veerapermal Pillay v. Narrain Pillay* (7), *Sreemutty Joymoney Dossee v. Sreemutty Sibosoonderee Dossee* (8), and *Perkash Chunder Roy v. Dhunmonsee Dossee* (9).

Mr. Forsyth, Q.C. Mr. Leith, Q.C. and Mr. Doyne for the respondent.—It is quite a mistake to suppose that the adoption was complete so as to be irrevocable; it was not so in fact or in law: all the ceremonies which should be performed in the house of the adoptor have been performed in that of the natural father. None of the benefits which would have accrued to the respondent and her husband have accrued, and this in consequence of the conduct of the appellant. While those deeds remain uncanceled, the respondent is bound by them, and she is entitled to both active relief and a declaratory decree—*Thakoor Deen Tewaree v. Nowab t yud Ali Hossein Khan* (10).

Mr. Cowie in reply.

(1) 22 L. J., Ch., 949.

(2) 25 L. J., Ch., 795.

(3) 9 W. R., 325.

(4) *Id.* 381.

(5) 9 B. L. R., 16, (note.)

(6) 1 Boul. Rep., 137.

(7) Notes of Cas. at Madras, 78.

(8) Fult. Rep., 75.

(9) S. D. A., 1853, 96.

(10) 8 W. R., 341.

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Their LORDSHIPS gave the following judgment :—

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The appellant was the defendant, and the respondent the plaintiff in the suit below. The suit was brought against the defendant for himself and as guardian of his minor son called in the plaint Noggendro Chunder Mitter, to set aside two deeds dated 30th Jaishtha 1271 (11th June 1864), relating to the adoption of the minor above-mentioned.

The plaintiff was the widow of Dwarkanath Ghose, deceased, who died childless. There was no dispute as to the fact of her having received permission from her deceased husband to adopt a son. The plaintiff, in her plaint, described the deeds; the one, as a deed by which the defendant agreed to give the said Noggendro Chunder Mitter, his minor son, to her for adoption in the *dattaka* form; and the other, as a deed by which she agreed to take the said child into adoption. The case of the plaintiff was that, notwithstanding the deeds, the defendant refused to give the child, and that therefore the form of adoption had not been complied with. The case of the defendant (see his written statement) was, that the deeds were not mere agreements, but that the deed executed by the plaintiff was a deed of adoption, and the deed executed by the defendant, a deed by which he actually gave his son in adoption, and that the plaintiff actually took the child, after the completion of the necessary rites and ceremonies. He stated that the plaintiff could not recede from the deed of adoption, and that he, the defendant, could not act contrary thereto. He proceeded :—" Now, when the said son, by virtue of his having been adopted, has obtained for himself and his heirs the legal proprietorship of the immovable and moveable property, and has become the undisputed *malik* of the estate (referring to the estate of the plaintiff's deceased husband) for ever, according to the precepts of the shastras, in that case the plaintiff has no power to ignore the adopted son's rights; for the giving and taking when completed cannot be revoked, and the plaintiff has no right to undo that which she has done in obedience to the command of her husband, and the Court cannot interfere in that which the plaintiff has already done." Further, he contended that, from the terms

of the deed executed by the plaintiff, it was clear that the child had been adopted, and that the necessary rites enjoined by the shastras had been performed, that the child had ceased to belong to his the defendant's *gotra* or family, and had been enrolled in the *gotra* of the plaintiff, and that the name and family name of the child had been changed from Mitter to Ghose after the family name of his adoptive father.

The deeds in form are certainly not mere agreements to give and take in adoption.

The deed of gift addressed to the plaintiff commences :—"This is a deed whereby the child is given in in adoption." Then after reciting that the plaintiff's deceased husband, in consequence of his having no issue, had during his life given permission to the plaintiff to adopt a male child, and that the plaintiff had asked the defendant for a child to compensate for the said defect and to perform the funeral rites of the plaintiff and her husband, &c., proceeded in the operative part of the deed as follows :—(*reads ante*, page 172).

The deed executed by the plaintiff addressed to the defendant commences :—(*reads ante*, pages 172 and 173).

The deeds having been executed and attested were both registered and made over to the plaintiff's mooktear.

The case was tried before the Principal Sudder Ameen, and amongst others the following issues were laid down :—Whether the adoption of the child was complete or not : that is, whether the requirements of the Hindu law were carried out, or the gift was not complete, and the child not made over. Whether the defendant refused to make over the child to the plaintiff or not. Witnesses were examined on both sides and several letters which passed between the defendant and Soorjo Narayan Singh, the brother of the plaintiff, were put in evidence. The Principal Sudder Ameen found that no religious ceremonies were performed ; he also tried as a distinct issue, whether there was a formal delivery and acceptance of the child, and found that issue in the negative in favor of the plaintiff. He said :—(*reads from "It is true" to "nor due delivery of the deeds," ante, page 177*).

It is not very clear what the Principal Sudder Ameen meant by the latter words, "nor due delivery of the deeds," or by the words used in another part of his judgment in which he says —

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"It has been established that the deeds are void for want of delivery." It is clear that he did not use the word "delivery" in the technical sense in which that word is used in England when applied to the execution of a deed. He probably meant that the deeds were not interchanged; but that was not necessary or important, if the deeds were deeds of gift and adoption, and not mere agreements to give and adopt. The deed executed by the defendant was delivered to the plaintiff. The fact that the deed executed by the plaintiff was retained by her, and not handed over to the defendant, would rather tend to show that at that time it was considered that the child had been adopted. For, if the child was adopted, the plaintiff became his mother and guardian, and would naturally keep the deeds of gift and adoption on behalf of the child as evidence of the adoption, and as part of the muniments of her child's title to his adoptive father's estates. Be this as it may, however, it is clear that the deeds were executed. They are admitted by the plaintiff in his plaint, and by the defendant in his written statement. Indeed, if they were not executed, the suit was useless and must fail.

In concluding his judgment the Principal Sudder Ameensaid:—*(reads from "Summing up" to "by the defendant," ante, page 177).*

Upon that judgment the following decree was drawn up:—*(reads decree of the Principal Sudder Ameen, ante, page 177).*

The defendant appealed to the Judge upon the following, amongst other, grounds:—*(reads 6th, 7th, and 14th grounds of appeal to the Judge of Bhaugulpore, ante, page 178).*

The appeal was transferred by the Judge to the Additional Judge. The latter did not try the issue, whether there was an actual or formal delivery of the child, or not. He said:—*(reads from "We now come to the merits" to "dismissed with costs," ante pages 179 and 180).*

The defendant appealed specially to the High Court. The fourth ground of appeal was:—*(reads ante, page 108).*

That ground of appeal was clearly directed to that part of the judgment of the Additional Judge in which, after saying that, "if the defendant's witnesses were to be believed, not only essential, but non-essential rites were performed," he says "he could not in the same breath say that one only—that of giving and taking—was performed." It appears to their Lordships that the view

taken by the Additional Judge was not correct. The question to be determined was not, whether the child was legally adopted or not, but whether there was sufficient ground for setting aside the deeds, or declaring them to be void. If the defendant gave the child, or was willing to give the child, the plaintiff had no right to sue him in order to have a declaratory decree that the deeds were null and void because certain religious ceremonies necessary to constitute a valid adoption had not been performed. If the defendant executed the deed of gift, which was admitted, and formally delivered the boy, it was the plaintiff's own fault if she did not formally accept the child and cause the religious ceremonies to be performed. If she chose to execute a deed, declaring that the child had been adopted by her with the prescribed rites and ceremonies, when in fact the child had not been even given, it was her own fault.

The most important issue in the cause was whether there was a formal gift of the child, or, in other words, whether there was an actual delivery of the child in addition to the execution of the deeds. That issue was not tried by the Additional Judge.

The defendant appealed specially to the High Court, and that Court held that it was not necessary to determine whether or not a Sudra can be adopted without the performance of religious ceremonies, and dismissed the appeal upon the ground that there was no actual giving and receiving of the child. They said :—

“We see no necessity to go into the question whether or not a Sudra can be adopted without the performance of religious ceremonies, namely the offering of the burnt sacrifice, &c.

“The contention of the special appellant is that, by the execution of two deeds, the one purporting to be a gift, and the other an acceptance of the child by the several parties respectively executing the deeds, there was a valid giving and receiving of the child, so as to make him the adopted son of the person who by these deeds appears to have accepted him as a son.

“We think there is no foundation for the argument of the special appellant. It appears to us that the giving and receiving of a son in order to constitute a valid adoption, must be an actual giving and actual receiving of the child.”

The High Court appears to their Lordships to have been in error in considering merely whether there was any valid adoption

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or not, instead of considering whether, if there was no adoption it was owing to the fault of the defendant or to the fault of the plaintiff herself. They also appear to have been wrong in holding on special appeal that there had been no actual giving of the child when the additional Judge had not tried that issue. They say :—

“ By the grounds of special appeal filed, the apdellant does not suggest that there has been any actual giving and taking of the child, but only a constructive giving and taking by the execution of the deeds. We think that, assuming the facts relied upon as regards such giving and receiving to be established, it is not shown that there was in this case any valid adoption. The change of name, supposed to be evidence by the deeds, is not a sufficient overt act to show that the child was given and received.”

With reference to that statement it appears to their Lordships that the fourth ground of appeal to the High Court referred to that part of the decision of the Additional Judge in which he held that the defendant could not rely upon the giving and taking alone, and that the only issue was, whether the religious ceremonies had been performed. The word “ceremonie,” in the fourth ground of appeal to the High Court was clearly intended to include the actual giving and taking, or delivery and acceptance of the child, for the Judge treated this giving and taking as a ceremony, but as one upon which alone the defendant could not rely. The judgment of the Judge is far from clear, arising from the use of the words “ceremonies” and “religious ceremonies.” He treats the giving and taking as a ceremony, but whether as a religious ceremony is not clear. He finds that the decision of the Principal Sudder Ameen that no religious ceremonies were performed was correct and afterwards speaks of the same finding as one to the effect, that no ceremonies were performed. Looking to the fact that the finding of the Principal Sudder Ameen, that there was no formal giving and taking, was distinct, and, in addition to his finding, that no religious ceremonies were performed, their Lordships think that the Additional Judge did not try or determine the issue whether there was a formal giving and taking notwithstanding the fourteenth ground of appeal to the Judge. This being so, it appears to their Lordships that the High Court were in error in deciding

the case upon the ground that there was no actual giving and actual receiving of the child. In the case of *Sreemutty Joymoney Doeses v. Sreemutty Sibosoonderees Doeses* (1), it was held by the Supreme Court in Calcutta that amongst Sudras no religious ceremony, except in the case of marriage, is necessary. If the Judges of the High Court considered that this suit was maintainable if there was no valid adoption, they ought to have determined whether, in the case of Sudras, any religious ceremonies were necessary to render an adoption valid, and, if they considered that religious ceremonies were not necessary, they ought to have directed the Judge to try whether there was a formal delivery of the child, or whether the defendant refused to deliver him, an issue upon which the defendant had appealed to the Judge from the finding of the Principal Sudder Ameen. If their Lordships thought that the suit could be maintained, they would now do what they consider the High Court ought to have done, but their Lordships do not consider that this suit is under any circumstance maintainable.

The suit is not to set aside the adoption, or to declare that there was no valid adoption, and thus to remove a doubt as to the child's title to the estates. It is merely to set aside the deeds. They were not actually necessary to render the adoption valid, and if they be set aside the defendant or the child may prove the adoption *aliunde*.

It was stated by the Principal Sudder Ameen that the estates of the plaintiff's deceased husband were of considerable value, paying a rental of Rs. 40,000 a year. The suit was valued at only Rs. 1,500. The appeal to her Majesty in Council was allowed upon the ground that the suit indirectly involved a claim to property of not less value than Rs. 10,000. The defendant pleaded that the suit was undervalued, but the Principal Sudder Ameen held that, as the pleader of the defendant had not argued the point, it might be presumed to have been given up. It would have been difficult for the defendant to contend that the suit, to have the deeds declared void or set aside, was of greater value than Rs. 1,500. The case was accord-

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(1) Fult. Rep., 75.

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ingly tried as a suit of that value. The consequence was that the regular appeal went to the Judge, and only a special appeal¹ to the High Court. If the suit had been valued at Rs. 5,000, the appeal to the High Court would have been a regular appeal in which they, and upon appeal from them, this tribunal, could have examined the evidence and determined the issues in fact. If a decree be made declaring that the deeds are invalid, a suit may still be brought by the infant to try his title to the estates, and in that suit the evidence may have to be weighed by the High Court, and afterwards by the Judicial Committee of the Privy Council. It would be very unsatisfactory if the deeds should be declared void in the present suit, and the adoption should afterwards be upheld in a suit by the infant against the widow, or any other child who, upon the faith of a declaratory decree in this suit, may be given to the plaintiff in adoption, and be adopted by her.

No fraud on the part of the defendant has been alleged or proved; all that has been charged against him is that he refused to give the child, or to execute a deed in cancellation of the former deeds.

If the instruments operated merely as agreements to give and accept the child in adoption, as contended by the plaintiff, the breach by the defendant of his agreement to give would not render the deeds null and void. The breach of an agreement by one of the parties thereto is a good ground for an action for damages, or for a specific performance, but it does not render the contract void or constitute any ground for setting it aside, or for declaring it to be null and void (1). The cause of suit is stated in the plaint to have arisen on the 10th Chaitra 1272 (22nd March 1866), when the defendant "denied executing," meaning "refused to execute," an *ikrarnama* in cancellation of the *ikrarnamas* aforesaid. One of the plaintiff's objects, as stated in her plaint, in having the documents set aside, was to throw off the burthen which was on her in consequence of the deeds. The High Court says:—

"There was no adoption. The natural father of the child now refuses to carry out his intention to give his child for the purpose of adoption

(1) See *Ranee Bhobosoondree Dasseah v. Issenchunder Dutt*, ante, p. 36.

But the deeds are capable of being at any time used by him or his son to prove that there was an adoption. Under such circumstances, it is clear that the plaintiff has a right to come to the Court to ask for relief and pray to have the deeds declared void. We interfere for the protection of her right to her husband's property over which those deeds would cast a cloud, which it is necessary for the plaintiff's security to remove."

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Their Lordships have already alluded to the absence of any allegation or proof of fraud on the part of the defendant, and also to the absence of any finding by the Judge upon the issue whether the defendant formally gave the child, or refused to deliver him. If the child was lawfully adopted, the estates of the plaintiff's deceased husband vested in him as son and heir, and the plaintiff ceased to have the estate of a Hindu widow therein; she also ceased to have any power to adopt another son during the life of the child.

It has been held that under the 15 & 16 Vict., c. 86 s. 50, a declaratory decree cannot be made unless the plaintiff would be entitled to consequential relief if he asked for it—*Rooke v. Lord Kensington* (1). The 15th section, Act VIII of 1859, is in similar terms. The plaintiff, upon the facts found, is not entitled to any relief against the defendant. It has been shown that, treating the documents as mere agreements between the plaintiff and the father of the child, the plaintiff could have no right to maintain the present suit. Treating the instruments as deeds of gift and adoption, which their Lordships consider them to be, there is no consequential relief to which the plaintiff would be entitled against the defendant if the deeds be declared void. Though deeds of gift and acceptance are not actually necessary for the validity of an adoption, they are still evidence in support of the child's title as an adopted son, and of his rights consequent upon the adoption. In a case of conflicting evidence, in a suit brought on behalf of the child against an adopting mother in respect of her deceased husband's estate a declaration by her, whether by deed or word of mouth, that she had adopted the child with all necessary ceremonies, would be strong corroborative evidence in the child's favor. In the present case

(1) 2 K. & J., 753, S. C., 25 L. J., Ch., 795.

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there was conflicting evidence as to the fact of a formal giving and taking, as well as to the fact of the performance of the necessary religious ceremonies, and even upon the evidence of the plaintiff's own witnesses, notwithstanding the allegation in the plaint that the child has remained in the house of his natural father, it appears that the child, whether adopted or not, did reside for some time in the house of the plaintiff. There are also expressions in the letters from the plaintiff's brother from which it might be inferred that the child had been adopted, and that the plaintiff was desirous to have the adoption cancelled. Their Lordships express no opinion upon the evidence, with reference to the fact of adoption, as the case is now before them merely upon appeal from a decision of the High Court upon special appeal.

It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. There is so much more danger in India than here of harassing and vexatious litigation, that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.

The child is no party to the present suit, and any declaration made in it with regard to the validity or invalidity of the deeds, will not be binding upon him if a suit be hereafter brought on his behalf against the present plaintiff respecting the estate of her deceased husband; nor would it be binding in any suit between the child and the reversionary heirs of the deceased husband after the death of the plaintiff; or between the child and any other child who, upon the faith of a declaratory decree in this suit, may hereafter be given in adoption or adopted by the widow, or between the child and his natural brothers, or any other person who may hereafter claim to exclude him from the heritage of his natural father's property upon the ground that he has been adopted into another family. It appears to their Lordships that, under these circumstances, it would not be exercising a sound discretion even if it could be done, to order the deeds to be

cancelled or to set them aside, or to declare them void. The defendant takes no interest under the deed of adoption; a declaration binding upon him only, and not upon the child, would be worse than unless, for it would not protect the plaintiff, or any child whom she may adopt, from any claims on behalf of the defendant's son to the estates; and it might induce some other person to give his son to the plaintiff in adoption and also induce the plaintiff to adopt another child when the declaration in the decree could not be of any possible use to them.

If the defendant's son was adopted, the defendant had no power to cancel the deed of adoption, or to give the plaintiff permission to adopt another son. Nor would his refusal to send back to the plaintiff her adopted son, or the fact of his harbouring him in his original home, invalidate the adoption. Whether the child was adopted or not, the defendant was not bound to execute a deed in cancellation of the former documents, and his refusal to execute such a deed could not give the plaintiff a cause of action as alleged in her plaint, or rightly subject the defendant to the costs of the suit which have been awarded against him.

It was suggested that a suit against the father, in his own right and as guardian of his minor son, was tantamount to a suit against the father and the son. But that is not correct. If the son had been made a co-defendant, it would have been necessary to have a guardian appointed for him. If the child was adopted, his natural father was not his guardian. In a suit by the plaintiff to set aside the deeds upon the ground that there had been no adoption, the plaintiff had no more authority to constitute the father the guardian of his son, by suing him as guardian, than the father would have had to constitute the plaintiff the guardian of the child, if he had sued her for a declaration that the child had been validly adopted. This is not a mere technical objection. If the father really refused to give the child in adoption, because he did not desire to have him adopted, he was not a proper person to protect the child's interest, or likely to make the best case on his behalf in a suit to declare the adoption invalid. In making these remarks, their Lordships do not desire to impute the father, in the

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present case, any neglect of his son's interests, for he appears to have desired to establish the adoption, and to have acted properly in refusing to execute a deed of cancellation when under the belief, whether right or wrong, that the adoption was complete. The law is clear upon the subject of guardianship of male minors. By Act No. XL of 1858, passed before this suit was instituted, it was enacted that the care of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court ; and by s. 3 it is enacted that, where the property is of small value, the Court having jurisdiction may allow any relative of a minor to institute or defend a suit in his behalf. In other cases certificate of administration is necessary.

The suit must be treated as one against the defendant, the father alone ; and for the reasons above given, their Lordships will humbly advise Her Majesty that the decree of the High Court, and the decrees of both the lower Courts, be reversed, and that the suit be dismissed, and that the plaintiff (the respondent) do pay to the defendant (the appellant) the costs of this appeal and the costs in all the lower Courts.

It is hardly necessary to add that this decision will be no bar to the trial of the question whether the child was or was not duly adopted in any suit properly framed for that purpose.

Appeal allowed.

Agent for appellant : Mr. Barrow.

Agent for respondent : Mr. Wilson.

APPELLATE CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Glover.

TARUK CHUNDER PODDAR AND OTHERS (PLAINTIFFS) v. JODESHUR
CHUNDER KOONDOO (ONE OF THE DEFENDANTS).*

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Feb'y. 11.

Hindu Law—Joint Family—Separate Acquisition—Presumption—Onus.

See also
14 B L R 349
12 B L R 389

The plaintiffs sued to have their rights declared under a mukurari maurasi lease obtain by *I*, father of the defendant, but it was said with joint funds and for the joint family consisting of *I* and his two brothers, fathers of the plaintiffs. The defence was that the lease was granted to *I* after the dissolution of commensality. The existence of any nucleus of joint property was not proved. Held that, where one member of a joint family is found to be in possession of any property, the family being presumed to be joint in estate, the presumption is, not that he was in possession of it as separate property acquired by him, but as a member of joint family. Therefore, the burden of proof was on the defendant to show that *I* had acquired the property separately, and that it was property which could by law be treated as a separate acquisition.

THE plaintiffs brought the suit to obtain possession of a share of certain lands taken on a maurasi mukurari lease by one Isserchunder, father of one of the defendants, but with joint funds it was said, and for the benefit of the joint family consisting of Isserchunder and his two brothers, Brijokishur and Hurishchunder, through whom the plaintiffs claimed. The defence was that the potta had been granted to Isserchunder after the dissolution of commensality.

The facts of the case are fully stated in the judgment of the Court.

The Munsif decreed the suit in favor of the plaintiffs. On appeal, the Judge throwing the *onus* on the plaintiffs dismissed their suit.

The plaintiffs appealed to the High Court

Baboo Bhuggobutty Ohurn Ghose for the appellants.—The Judge was wrong in throwing the *onus* on the plaintiff in this

* Special Appeal, No. 592 of 1872, from a decree of the Subordinate Judge of Furreredpore, dated the 1st January 1872, reversing a decree of the Munsif of that district, dated the 31st July 1871.

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case. Every Hindu family is presumed to be joint in food, in worship, and in estate until it is separated. The separation must be proved by the party who asserts it—*Dhurm Das Pandey v. Mussamut Shama Soondri Dibiah* (1), *Koonjbeharee Dutt v. Khetturnath Dutt* (2), and *Nilkristo Deb Barmano v. Bir Chandra Thakur* (3).

Baboo Chunder Madhub Ghose for the respondent. The *onus* of proving that the acquisition was made with joint funds and for the joint family, and that the property was held as joint family property, was upon the plaintiffs, and this *onus* they have not discharged, and their case has been rightly dismissed. This is not a case where a family is shown to have possessed any ancestral property, or any joint property or funds which might have served as a nucleus for the acquisition of the property in suit—*Mussamut Soobheddur Dossee v. Boloram Dewan* (4), *Khilut Chunder Ghose v. Koonj Lall Dhur* (5), *Dhunookdharee*

(1) 3 Moor's I. A., 229.

(2) 8 W. R., 270.

(3) 3 B. L. R., P. C., 13; S. C., 12 Moor's I. A., 523.

(4) W. R., Sp. No., 57.

(5) *Before Mr. Justice Loch and Mr. Justice Mitter.*

KHILUTCHUNDER GHOSE (DEFENDANT) v. KOONJ LALL DHUR (PLAINTIFF).*

The 2nd September 1868.

Hindu Law—Joint family property—Presumption—Burden of Proof.

Baboo Mutty Lall Mookerjee for the appellant.

Baboo Girish Chunder Ghose for the respondent.

THE following judgments were delivered.—

LOUCH, J.—It appears that the Judge has thrown the *onus* of proof on the wrong party. He required the defendant

to prove that the property in dispute was purchased by Bholanath out of his own means. It appears that one Bholanath purchased the property connected with this case in execution of a decree. His rights and interests were subsequently sold and purchased by one Unooda, who sold it to the defendant. The plaintiff in this case has purchased the rights and interests of Bhoynrubnath, a brother of Bholanath, in this property, and sued to recover possession of his share. The first point before the lower Court was whether the property was the sole property of Bholanath, or the joint property of Bholanath, Bhoynrubnath, and Brojonath. It appears to have been admitted that the three brothers, Bholanath, Bhoynrubnath and Brojonath, lived in commensality; and the lower Appellate Court has considered this fact sufficient to warrant the presumption of Hindu law that a property purchased by one member of a family was purchased for the benefit of all the members, without ascertaining whether

* Special Appeal, No. 1335 of 1868, from a decree of the Judge of Sylhet, dated the 28th February 1868, reversing a decree of the Principal Sudder Ameen of that district, dated the 17th May 1867.

Lall v. Gunput Lall (1), *Shiu Golam Sing v. Baran Sing* (2), and *Banee Madhub Mookerjee v. Bhugobutty Churn Banerjee* (3). Had it been shown that there was a nucleus of joint family property with which this property might have been acquired, the presumption relied upon by the other side might have arisen, but no joint property is at all shown to have existed. In *Nilkristo Deb Barmano v. Bir Chandra Thakur* (4), the remark that the normal estate of a Hindu family is joint, was applicable to the particular case set up by the plaintiff, viz., that the property being an ancestral impartible raj descending to a sole heir, it was an undivided joint property to which the plaintiff being the eldest male member was entitled to succeed. Their Lordships of the Judicial Committee did not intend to lay down any rule with reference to the question now before, the Court, and to a case where there is no joint estate out of which an acquisition might have been made. The remarks do not touch the present question: and even if they did, they would be merely *obiter dicta*. These remarks do not in reality go further than what was laid down in the case of *Naraguntty Luchmeedavamah v. Vengama*

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there was any ancestral property from which funds were derived for the purchase of this property; and he has required the defendant, who is the representative of the auction-purchaser of Bholanath's share, to prove that Bholanath purchased from his separate funds. The plaintiff, respondent in this case, alleges that the property was purchased by Bholanath and Bhoyrubnath from joint funds. We do not, however, find that any evidence has been given on the part of the plaintiff to show that there were other properties from which the funds for the purchase of this property could have been derived, and before calling on the defendant, as the Judge has done to prove that this property solely belonged to Bholanath, and was purchased by him, the plaintiff should have started his case and shown that there was a joint source from which funds were available for the purchase of this property for the family. The Judge appears to have thrown the onus on the defendant, special appellant

in this case, and has given a decree to the plaintiff, because the defendant has failed to prove his case. We think that the case should be remanded to the Judge to come to a finding on the plaintiff's evidence, and to determine whether there was any joint fund, from which means could be derived for the purchase of the property. Should the plaintiff make out his case, he will then look to the evidence of the defendant. Costs of this appeal will follow the ultimate result.

MITTER, J.—I concur. Under the circumstances stated by my learned colleague, the plaintiff is bound to start his case. There can be no presumption of joint ownership from the mere fact of commensality.

(1) *Post*, p. 201.

(2) 1 B. L. R., A. C., 164.

(3) W. R., 270.

(4) S. B. L. R., P. C., 13; S. C., 12 Moore's I. A., 523.

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Naidoo (1), viz., that the family is to be presumed to be joint until division is proved. The case of *Dhurm Das Pandey v. Mussamut Shama Soondri Dibiah* (2) is not an authority in support of the general proposition contended for by the appellants. It rather supports the view uniformly taken by this Court, and the late Sudder Court, of the question at issue ; for there, admittedly, the family had some joint property, and upon that footing the presumption of law in favor of joint property was raised. In the case of *Naraguntty Luchmeedavamah v. Vengama Naidoo* (1), already alluded to, the contest was between a male member of the family of the deceased *poligar* and the widow of the deceased in respect of an ancestral estate, and the question was whether the plaintiff, a male surviving member, was a member of an "undivided family," or otherwise whether there had been a separation, in which latter case the widow might claim in preference to the plaintiff ; and the *onus* of proving separation was cast upon the widow.

The judgment of the Court was delivered by

COUCH, C.J.—This suit was brought by the plaintiffs to have their rights under a *miras* (hereditary) lease obtained by their ancestors of a certain share of a tenure known by the name of Baran Moollah confirmed and declared ; and their case was that Isserchunder, the father of the second defendant, an infant, Brijokishur, the father of the first set of plaintiffs, and Huriah-chunder, the father of the second plaintiff, being three uterine brothers while living jointly and in commensality, acquired with the aid of their joint funds, a *mokurari maurasi* lease on the 15th of Chaitra 1264 (21st March 1858).

The defence set up was that the lease was in fact granted by the lessors to Isserchunder after the dissolution of the commensality between the co-parceners, and that at the time of the granting of the lease, there was a verbal stipulation to the effect that, upon the payment of the bonus-money, the lease would be returned to the lessor, and that the defendant received back the bonus-money.

(1) 9 Moore's I. A., 66.

(2) 3 Moore's I. A., 229.

It seems that the issues had been framed by the predecessor of the Munsif who tried the case, and that the latter modified them and framed amongst others this, "whether the *miras* lease in respect of the share of the mouza in dispute had been acquired by Brijokishur, the father of the first plaintiffs, Harishchunder, the father of the second plaintiff, and by Isserchunder, father of defendant No. 2, while they were living jointly and in commensality, and had been held by them in joint tenancy; and whether, after their decease, the second defendant and the plaintiffs had been jointly in possession of the property, or whether the plaintiffs had been dispossessed of the property in suit by the first defendants:" and, secondly, "whether Isserchunder, the father of the second defendant, had acquired a *miras* leave in respect of the property in suit after severance of the commensality with the fathers of the plaintiffs," which was really involved in the first issue.

The Munsif then tried the case, and he said in his judgment:—"It has been satisfactorily proved that the said Isserchunder and his brothers, Brijo and Aurishchunder, held the property in dispute jointly both while they were living in a state of commensality, and also after a severance of the commensality, and that, after their death, the present plaintiffs and the defendant have also held the said property jointly," and then noticing what is laid down in Mr. Norton's work on evidence (1), and stating that it appeared that the three brothers were living in a state of family partnership, he said "a heavy burden lies on defendant No. 1 to prove the fact of the separate acquisition of the property in suit, and the defendant No. 1 has totally failed to discharge the said *onus*." He then decreed in favor of the plaintiffs, ordering that they should recover possession of the share which they claimed.

The case came on appeal before the Subordinate Judge, and he, after noticing the decree the Munsif had made, said:—"With reference to the second issue, I find that it is admitted on all hands that the *miras* lease, in respect of the property in suit, was obtained in the name of Isserchunder. Therefore, under the

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(1) Sec s. 590, 2nd edition.

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precedents quoted in the margin (1), the *onus* of proving the fact of the acquisition of the leasehold property by the three brothers, namely, Isserchunder, Brijokishur, and Hurisbchunder, the ancestors of the plaintiffs, with the aid of the joint ancestral funds, and at a time when the three brothers were living in a state of family partnership, was upon the plaintiffs. I am of opinion that the plaintiffs have failed to discharge the said *onus* satisfactorily." And he decreed the appeal, setting aside the Munsif's decision, and ordering the suit to be dismissed.

In his judgment he also said that it had been proved that the *miras* lease was acquired by Isserchunder, who had paid the bonus necessary for obtaining it ; and as there was no evidence to show that the fathers of the plaintiffs, or the plaintiffs themselves, had any interest in the said leasehold estate, " it is not at all necessary to put the defendant to strict proof of his title. He therefore threw upon the plaintiffs the burden of proving that the property had been acquired by the family jointly, instead of putting the burden of proof upon the defendant as the Munsif had, and the question raised in this special appeal, and upon which, seeing the small amount of evidence there is in the case, the decision of the suit really depends, is, upon which party ought the burden of proof to have been laid.

Now the Judicial Committee of the Privy Council, in *Nilkristo Deb Barmano v. Bir Chandra Thakur* (2), have laid down the rule by which this Court must be guided. At page 540, their Lordships say :—" The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship, and estate. In the absence of proof of division, such is the legal presumption ; but the members of the family may sever in all, or any of these three things. The family in which a title to a kingdom exists in one member follows this general law, but it follows it in part only, for the succession to a kingdom is an exception to it from the very nature of the thing, the family may have property distinct from that to which a sole heirship belongs, and may continue joint." These observations have

(1) *Mussamut Soobheddur Dossee v. Boloram Dewan* W. R., S. No., 57 ; and *Khilut Chunder Ghose v. Koonj Lal Dhur*, ante, p. 194.

(2) 3 B. L. R., P. C., 13, sec 17 ; S. C., 12 Moore's I. A., 523, sec 54.

reference to the particular case before their Lordships, but here they lay it down in most distinct terms that every Hindu family is presumably joint in food, worship, and estate; and the same law had been laid down, in a previous case of *Naraguntty Luchmeedavamah v. Vengpma Naidoo* (1), where it is said that the presumption with regard to a Hindu family is that it remains undivided. In another case before the Judicial Committee, *Dhurm Das Pandey v. Mussamut Shama Soondri Dibiah* (2), we find the law laid down which is applicable to the case before us. Their Lordships say:—"It is allowed that this was a family who lived in commensality eating together, and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property. Such evidence may be received, but their Lordships are of opinion that such evidence has not been given in this case, with regard to any part of the property. Now what has been relied upon, with regard to a portion of the property, has been chiefly that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it, but all that is perfectly consistent with the notion of its having been joint property, and even if it had been joint property, it still would have been treated exactly in the same manner. We have heard from the highest authority, from the authority of Sir Edward East and Sir Edward Ryan whose most valuable assistance we have in this case (and it gives me a confidence that I should not otherwise have felt) that the criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid; therefore I think that, so far on this part of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property." Now, with regard to what their

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(1) 9 Moore's I. A., 66; see 92.

(2) 3 Moore's I. A., 229; see 240.

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Lordships say as to the family being possessed of property, and that the presumption of law is that all the property the family is in possession of is joint property, the rule that the possession of one of the joint owners is the possession of all would apply to this extent that, if one of them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of a joint family. It being so, until in this case it is shown that Isserchunder had acquired it separately, and it was property which could by law be treated as a separate acquisition, the presumption is that it was the joint property of the family. It was for the person who set up a different state of things from what is to be presumed to give evidence of it. It was the duty of the defendant to meet the presumption which arose from the state of the family, and the possession by one of them of the property. That appears to me to be the result of the judgments of the Privy Council which I have referred to.

There is no doubt a conflict of decisions in this Court upon this subject. I can see no way of reconciling them. We must follow what has been laid down by the Court of Appeal from this Court; and I may observe that, in decisions of this Court which are in conflict, the judgments of the Privy Council do not appear to have been noticed; in some they have not been noticed at all, in others I do think they have not been noticed in the manner they would have been if the attention of the Judges had been directed to them. I have no doubt it frequently happens in this Court that all the authorities bearing on the subject are not presented to the Court in the argument, and this sometimes leads to a conflict of decisions.

I have said there are various decisions in this Court which cannot be reconciled with the law, which I feel bound by the judgments in the Privy Council to lay down. The case of *Khilut Chunder Ghose v. Koonj Lall Dhur* (1) which was quoted to us, is certainly contrary to the decision of the Privy Council

(1) *Ante.*, p. 194.

As to the case of *Dhunookdharee Lall v. Gunput Lall* (1), it may be said that facts were found there which rebutted the presumption (1) *Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.* The special appeal therefore will be dismissed with costs.

The 8th July 1868.

DHUNOOKDHAREE LAL (PLAINTIFF)
v. **GUNPUT LALL (DEFENDANT).***

*Hindu Law—Joint Family Property—
Presumption—Burden of Proof.*

Baboo *Debandra Narain Bose* for the appellant.

Mr. R. E. Twidale for the respondent.

THE following judgments were delivered:—

JACKSON, J.—It is satisfactory to find that in this case our order of remand has produced from the Additional Judge a judgment infinitely more satisfactory and convincing than the judgment which came before the Court when the case was last heard.

It now appears that he has found as a fact, and it is not alleged that the evidence is not sufficient to warrant that finding, that the joint family property to which the plaintiff and defendant were entitled was not sufficiently large after supporting the members of the family to leave any surplus funds from which the property in suit could have been acquired, and it appears that the two brothers Gunput and Onpooch were at that time pursuing lucrative employments, the plaintiff himself being a minor.

In this state of facts, affording no ground for the usual presumption as to joint family estate, the plaintiff could not succeed. I entertain no doubt speaking for myself that our judgment remanding the case was perfectly just and right, and I have the satisfaction of seeing that it has borne fruit in the shape of a judgment which we are able to affirm.

* Special Appeal, No. 3462 of 1867, from a decree of the Additional Judge of Tirhoot, dated the 23rd September 1867, reversing a decree of the Sudder Ameen of that district, dated the 22nd June 1865.

MITTER, J.—I am of the same opinion. It is admitted that the property in dispute was purchased by the defendant (respondent.) The plaintiff's case, however, was that the purchase was made with joint funds belonging to himself and the respondent.

It is true that, in a case of this nature where the defendant pleads self-acquisition, the *onus* of proving such acquisition lies on the defendant. But all that the Hindu law requires the defendant to prove in such a case is that the property which he claims as his own was acquired "without detriment to the paternal estate," or in other words, without using the paternal estate, or the proceeds thereof. The defendant having shown that, in acquiring the property in suit, he did not use any property which belonged to the joint family, the presumption of joint ownership is at once rebutted, and it is for the plaintiff to show that the property was acquired in the manner alleged by him.

His case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it.

It is a mistake to say that, in every case in which a Hindu pleads separate acquisition, it is incumbent on him to show the source from which the money came. No doubt, as remarked by their Lordships of the Privy Council, in the case of *Dhurm Das Pandey v. Mussamut Shama Soonduri*;

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tion, and so it cannot be considered as laying down any rule as to the *onus* of proof. So the case of *Mussamut Soobheddur Dossee v. Boloram Dewan* (1) is also contrary to the decisions of the Privy Council. I must adopt the judgment of the Court of Appeal rather than the law laid down in that case. The case of *Koonjbeharee Dutt v. Khatturnath Dutt* (2) is consistent with the decisions of the Privy Council. It was argued before us, and reference was made to the case of *Banee Madhub Mookerjee v. Bhugobutty Churn Banerjee* (3), that it was not shown here that there was any nucleus of property by means of which this acquisition by Isserchunder might have been made, and that at least the plaintiff ought to have given some evidence of that: I must observe that what is said in that case about there being a nucleus of property is only a *dictum*; no doubt, it would be very useful for the plaintiffs to show that, but I cannot agree that they are bound to do it. That *dictum* seems to me to be inconsistent with the doctrine laid down by the Judicial Committee. There is one more case which I must notice that is directly opposed to the decisions of the Privy Council—*Shiu Golam Sing v. Baran Sing* (4). With every respect for the learned Judges who pronounced that decision, I feel obliged by the superior authority of the Privy Council to differ from it. The law laid down by the Judicial Committee in 12 Moore's I. A., (5) does not appear to have been presented to the learned Judges. Probably, if it had been, they would, whatever their own opinion might be on the subject, have considered that they were bound to follow it.

Dibiah (a), the source from which the money comes is the "chief criterion" for determining as to whether a particular property is joint or separate, but their Lordships never said that it is the only criterion so as to render it obligatory on the party who pleads self-acquisition to give evidence of the particular source from which the money was derived.

The appeal ought therefore be dismissed with costs.

(1) W. R., Sp. No., 57.

(2) 8 W. R., 270.

(3) *Id.*

(4) I B. L. R., A. C., 164.

(5) 3 B. L. R., P. C., 13. There is a note by the Chief Justice to this passage in the margin of the original judgment to the effect that the words "12 Moore's I. A." should be "3 Moore's I. A."

(a) 3 Moore's I. A., 229.

The result of a consideration of the authorities appears to me to be that the Subordinate Judge was wrong in what he laid down as to the *onus* of proof. He improperly put upon the plaintiffs the *onus* of proving that (to use his own words) "the property was acquired with the aid of joint funds, and at a time when the brothers were living in a state of family partnership." That is opposed to the authorities which this Court is bound to follow, and on that account his decision must be reversed, and the case must be sent back to him for retrial.

The costs of this appeal will follow the result of this suit.

Appeal allowed.

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PRIVY COUNCIL.

(1) SADUT ALI KHAN (DEFENDANT) v. KHAJEH ABDOOL GUNNEY
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AND

(2) KHAJEH ABDOOL GUNNEY (PLAINTIFF) v. MUSSAMUT
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[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Act VIII of 1859, s. 15—Declaratory Decree—Limitation—Payment—Act X
of 1859—Enhancement.*

See also
15 B.L.R. 78
15 B.L.R. 82

A declaratory decree may be made only where the declaration of right may be the foundation of relief to be got somewhere. Thus, a suit to establish a title to land, with a view to taking proceedings in the Collector's Court under Act X of 1859 to enhance the rent, is one in which a declaratory decree may be made.

The Judicial Committee will not on light grounds interfere with the exercise by a High Court of its discretion in granting a declaratory decree the suit being one in which a declaratory decree may be made.

THE first appeal was from a judgment of a Division Bench of the Calcutta High Court (Loch and Hobhouse, JJ.), dated the 4th February 1868, by which a decree of the Principal Sudder

* *Present* :—THE RIGHT HON'BLE SIR J. W. COLVILLE, SIR B. PRACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PRESL.

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Ameen of Mymensing, dated the 10th April 1867 was reversed, and a decree passed in favor of the respondent in the suit which he had instituted in the Mymensing Court. The object of that suit was to obtain a declaration that the plaintiff had a proprietary right to the extent of seven-sixteenths in a certain talook of 22 manzas, and thereby to enable him, in proceedings to be taken in the Revenue Courts, to enhance the rent from the previous rental of Rs. 49 to one of about Rs. 10,000. The Principal Sudder Ameen dismissed the suit on the ground that the plaintiff had failed to show any proprietary right, or the receipt of any portion of the rent of the lands in suit within 12 years. The High Court held he had a right to seven-sixteenths of the rent of Rs. 49, and was not barred by the law of limitation.

The facts of the case were as follows:—

One Fyz Ali Khan, a zemindar, being the owner of the 22 villages amongst other property, died on 16th December 1824, leaving two widows, Reazoon Khanum and Shumsoonissa Khanum and a minor son, the present appellant, by his first wife, Reazoon Khanum. Fyz Ali Khan, on the occasion of his marriage with his second wife Shumsoonissa, executed *kabinama* or marriage settlement dated 3rd Pous 1220 B.S. (6th December 1813), fixing her marriage dower at Sicca Rs. 9,000 and 500 gold mohurs, whereof one-third was prompt, and declaring that, in lieu of the prompt dower, he made over and gave to her the said 22 villages. The *kabinama* did not fix the jumma or rent to be paid by Shumsoonissa to the said zemindari, in respect of the said 22 villages, and it was afterwards a question whether this was rent payable, as contended by Shumsoonissa, at a fixed rate of Rs. 49 under an *ikrar* or agreement, dated 24th Kartik 1221 (8th November 1814), alleged by Shumsoonissa, to have been executed by her husband, or, as contended by Reazoon and the appellant, at the rate of Rs. 893-3-5-1, the amount of jumma inserted in the quinquennial papers.

On the death of Fyz Ali Khan a contention arose between the two widows. Shumsoonissa contended that Reazoon was not a legal wife, and took possession of the whole estate, and the Judge of Mymensing, on a summary investigation, passed an

order that Shumsoonissa should hold possession of all the property left by the deceased Khan, and that Reazoon should bring a suit in the Civil Court to establish the rights claimed by her. The respondent's father, Khajeh Azim Oolah, advanced money to reazoon to enable her to bring such suit, and to pay her current expenses, and she, on the 24th September 1829, on behalf of herself and as guardian of the appellant, Sadut Ali Khan, then a minor, brought a suit in the Dacca Court against Shumsoonissa to establish their rights to and for possession of a 15-anna share of the zemindari of which the villages were part, and other estates left by Fyz Ali Khan.

By a *sharahatnama* or deed of sale and partnership dated the 16th Chaitra 1299 (26th March 1883), the appellant who had then attained his majority, and his mother, Reazoon, in consideration of Sicca Rs. 15,000 which they had received from Khajeh Azim Oolah, in ready money, and appropriated to the costs of the last mentioned suit, and the necessities of life, such as subsistence, clothing, and the payment of *poonor* debts, and for the other considerations therein mentioned, made the said Azim Oolah a partner and proprietor of a moiety of the estate in dispute in the said suit, and declared that, after the disposal of the case, he should enter into possession of a moiety of the entire estate, like themselves, by virtue of the co-partnership, and should be at liberty to alienate it by gift or sale, and get the said zemindari and talooks registered in his own name by cancellation or removal of the names of the former proprietors.

On the 9th day of May 1832, a decree was made by the Dacca Court that the entire estate of Fyz Ali Khan, after payment of his debts, be divided into 16 shares, and that Reazoon should get possession in her own right and for the appellant of a 15-anna share of the said zemindari, and the talookas and dwelling-house detailed in her petition of plaint, and profits as in the decree mentioned.

Against this decree Shumsoonissa preferred an appeal to the Sudder Court, and on the 31st December 1834, a decree was made which so far as the same is material, was in the following words :—

“ It is accordingly ordered that the decision of the Provincial Court of Jehangurnugger, dated 9th May 1832, be modified and amended

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in this manner:—That the property mentioned in the *kabinama* be excluded for the one-third the prompt dower from the property sued for, in the event of its being included therein; that the two-thirds, the deferred dower of the appellant (Shumssoonissa) whatever it may amount to upon calculation, be paid out of the sum of Rs. 1,41,857-12-15-2 in deposit as profits in the Collectorate; and that the share of the zemindari of Pergunna Atteeah, &c., being the estate of Fyz Ali Khan, and the profits in deposit in the Collectorate being divided into 16 shares, one share be excluded therefrom as the right of the appellant (Shumssoonissa) as his widow; and that a decree be passed in favor of the respondent, former plaintiff (Reazon) for 15 shares, *viz.*, 1 anna in her own right as widow, and 14 annas as the right as a son of Sadut Ali Khan, the minor son; that in execution of the decree of this Court the respondent Reazon do get possession of a 15-anna share of the zemindari, talookas, &c., as detailed in the petition of plaint appertaining to the estate of Fyz Ali Khan, and a 15-anna share of the profits aforesaid, mesne profits accruing due on her own share and that of Radut Ali Khan, from the date of institution of suit up to date of getting possession, as provided in the the decision if the Provincial Court from the appellant (Shumssooniss.)”

Shumssoonissa, being dissatisfied with the decree of the Sudder Court, appealed to Her Majesty in Council,

Pending this appeal the mehals included in the *kabinama* were attached by the order of the Revenue Court of the district on 16th June 1835, and the 1-anna share in the said zemindari, the portion of Shumssoonissa, as widow, was attached on the 8th May 1836. The 15-anna share belonging to Reazon and Sadut Ali Khan had been previously attached by the Revenue Court in the month of August 1833. Proceedings were taken in the suit by order of the Civil Court of Zillah Mymensing, dated 10th December 1836, for the purpose of calculating the amount of the mesne profits mentioned in the said decree of the Sudder Court, and the Collector of the said zillah was requested to report as to the amount of these mesne profits from the papers of the attaching *sarbarakar* (manager). In the course of these proceedings, the question arose as to what jumma or rent was payable by Shumssoonissa for the 22 villages held by her under the *kabinama*. This question was investigated by the Collector of Mymensing, and by the Zillah Court of Mymensing, and by

the Commissioner of the 15th division, Dacca. Shumssoonissa contended that these villages were subject to a jumma or rent of Rs. 49 only, payable to the zemindar under the *ikrar* signed by the said Fyz Ali Khan, dated 24th Kartik 1221 (8th November 1814), and not, as Reazoon on the part of herself and Sadut Ali Khan contended, to rent payable to the zemindar according to the papers of the quinquennial settlement, viz., Rs. 893-8-5-1.

In June 1841 Shumssoonissa having died, Khajeh Hedaet Oolah, brother of Shumssoonissa, proved his heirship to her : and it was ordered that the 1-anna share, the right of Shumssoonissa, deceased, as a wife, should remain in the possession of the said Khajeh Hedaet Oolah, who had been substituted in her stead, in the same manner as it remained in her possession, and that the said Khajeh should pay the revenue of the 1 anna above referred to, as usual, into the Collectorate : and that as to the rent of the monzas of the *kabinama* which were as a mofussil talooka the property of the deceased, and the ancient jumma whereof was fixed at Rs. 49, the said Khajeh Hedaet Oolah should pay, in proportion with the rents of the 15-anna share, under attachment, to the attachment officer. And it was declared that there was no power to enhance the rent beyond the fixed jumma ; but should the decree be affirmed on appeal to England, Reazoon would then be at liberty to bring a suit for enhancement of rent.

Under the terms of the *sharakatnama*, Khajeh Azim Oolah got possession by an *amaldari* dated 15th Aghran 1244 B. S. (29th November 1837) of a 7½-anna share, being a moiety of the 15-anna share of the said zemindari and talookas mentioned in the decree of the Sudder Court, but on 1st Asar 1245 B. S. (14th June 1838) by an agreement signed between Khajeh Azim Oolah and Reazoon and Sadut Ali Khan, Khajeh Azim Oolah gave up a ½-anna share out of the said 7½-anna share to Reazoon and Sadut Ali Khan.

In 1846, the appeal of Shumssoonissa to Her Majesty in Council having been dismissed, and the decree of the Sudder Court of 31st December 1834 affirmed (1), the attachment of the

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(1) 3 Moore's I. A., 295.

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decreed property was removed, and an order was received by the Civil Court of the district that possession should be given of the property decreed. Thereupon, Khajeh Azim Oolah presented a petition to get possession of this 7-anna share of the said property, and his share of the money in deposit in the Collectorate, but, inasmuch as he was not a party to the said suit, it was ordered that the execution of the decree should proceed as therein directed, and Reazoon having died, Sadut Ali Khan obtained possession of all the property decreed, and excluded Khajeh Azim Oolah from his 7 anna share.

In order to recover the costs of Shumsoonissa's appeal to England, Sadut Ali Khan sued out execution against her heir, Khajeh Hedaet Oolah, and on 26th August 1846, proclamation was made of the sale of the right, title, and interest of Shumsoonissa, and by right of enrolment, of her heir, Khajeh Hedaet Oolah, in the said zemindari and the said 22 villages, and it was stated in the proclamation that the jumma of the said 22 mehals which belonged to the debtor, Shumsoonissa, in her right under the said *kabinama* was Rs. 49, and it referred to the proceeding of the Sudder Dewanny Adawlut, dated 14th June 1841, reserving liberty of suit for enhancement of rent in explanation of the jumma payable in respect of the talooks.

Sadut Ali Khan in May 1847 purchased the 1-anna share of Khajeh Hedaet Oolah in the said zemindari, and also the right, title, and interest of Khajeh Hedaet Oolah as heir of Shumsoonissa in the said 22 villages as advertised in the proclamation.

In October 1847, Khajeh Azim Oolah commenced a suit in the Court of the Principal Sudder Ameen of Mymensing against Sadut Ali Khan to recover possession and obtain mesne profits of his 7-anna share of the said zemindari, and the talooks and other property recovered by Reazoon and Sadut Ali Khan under the decree in their suit against Shumsoonissa. The Principal Sudder Ameen gave a decree in favor of Khajeh Azim Oolah for the 7-anna share claimed by him in the suit, which decree was affirmed by the Sudder in June 1853.

Khajeh Azim Oolah having died, his son, the respondent, applied for execution; and objections having been made by

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Zamoorudoonissa Khanum, wife of the appellant, that part of his interest had been assigned in satisfaction of dower, and the same having been allowed, the respondent obtained full and quiet possession of the 7 annas of the zemindaries to which he then claimed to be entitled, and a compromise was come to between him and the appellant as to the respondent's claim for mesne profits, under which the respondent agreed to give up Rs. 1,48,574 out of his claim, and take Rs. 70,000 in full satisfaction, and to strike off all suits at that time pending between him and the appellant.

In June 1855, the appellant applied to the Collector for a partition of the zemindari into three parts, that is to say, giving 7 annas to the respondent, 7 annas to the appellant's wife in satisfaction of dower, and 2 annas to himself. This partition proceeded to a certain length, but was, in August 1861, stopped by the Collector, in consequence of certain existing difficulties and in expectation of a new law to remove them. During the pendency of the partition proceedings, the respondent appears to have endeavoured to have the 22 mouzas surveyed as part of the zemindari, to which Zamoorudoonissa objected, on the ground that those mauzas formed a separate talook at a fixed rent of Rs. 49, and had been assigned to her by her husband in satisfaction of her dower, and that the respondent's right was confined to receiving his portion of that rent.

On the 19th of June 1862, the respondent filed a plaint under the Rent Act against the appellant and his wife, which he afterwards amended as to the amount of rent claimed, claiming to recover a year's rent in respect of seven-sixteenths of the 22 mauzas, according to notice, at the rate of Rs. 4,531. The Deputy Collector dismissed that suit, and the respondent in 1864 filed a second plaint under the Rent Act, by which he sought to enhance the rent to Rs. 4,532-11-3 in respect of his 7-anna share, and in July 1865, the Deputy Collector gave the respondent a decree for the rent of Rs. 49, each party paying his own costs. From this decree both parties appealed to the High Court, which, on the 26th February 1866, dismissed the respondent's appeal, and, allowing that of the appellant, dismissed so much of the Deputy Collector's decree as gave the respondent

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a right to recover rent at the rate of Rs. 49. The grounds for so dismissing the respondent's suit were that he had not proved the legal notice, and that he had not shown that he had ever received rent in respect of the 22 mauzas, or that he stood to Zamoorudoonissa in the relation of landlord to tenant. An application for review of the last judgment was made and refused.

The present suit was instituted on the 3rd September 1866, by the respondent against the appellant and his wife, to establish his proprietary right in the lands in suit, referring to the previous litigation and to the Court having directed the respondent to establish his proprietary right.

The appellant contended that, according to the respondent's own admissions in the rent litigation, he had never received any rent, and was therefore barred by the law of limitation, and that, as these lands had been "excluded" by the Sudder Court from the decree under which the plaintiff became entitled, he had no right thereto.

The following were the issues :—

"1st.—Whether the plaintiff's suit is barred by the statute of limitation or not?"

"2nd.—Whether an action for declaration of title can lie in respect of dispossessed property or not?"

Issues of fact :—

1st.—Whether the 22 mauzas in dispute, not being denied by either party to be within the As. 5-1-1-1 share of zemindari No. 10, Pergunna Atteeah, &c., the right, title, and interest therein were included in the 7-anna share of the zemindari which plaintiff's father obtained a decree for, or whether these mauzas were always, even before that, excluded from that share and held as a separate property?

"2nd.—Whether it is true that the plaintiff got his share of the zemindari and the mesne profits of the mauza in dispute by private arrangement, on a deed of instalment from the defendant Sadut Ali Khan, and whether it is true that the plaintiff never got any share of the rent of the mauzas in dispute?"

"3rd.—What is the right, title, and interest which defendant Sadut Ali Khan has purchased at the auction-sale, in execution of the decree, in these 22 mauzas?"

The Principal Sudder Ameen, on the 10th April 1867, delivered judgment, whereby, after stating the nature of the

suit and the issues, he decided in favor of the respondent on the issues in bar, but decided on the first issue on the merits that it had not been proved to his satisfaction that the respondent's father obtained a decree for the proprietary right of the said 22 villages in connection with 7-anna share of the zemindari; and on the second issue on the merits he decided that the respondent had failed to prove by satisfactory evidence "that he held a proprietary right in 7 annas of the disputed mehals, obtained a decree for the same, and received rents from the defendants within 12 years preceding the institution of the present suit." He thereupon declared that the decision of the third issue was unnecessary, and ordered the suit to be dismissed with costs.

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The plaintiff appealed to the High Court.

The appeal was heard on the 4th February 1868 before a Division Bench of the High Court (Loch and Hobhouse, JJ.), who reversed the decree of the lower Court, and decreed the plaintiff's claim with costs.

In his judgment on the merits of the case, Loch, J., remarked as follows :—

"The first point to be determined is the meaning of the late Sudder Court's decree of the 31st December 1834. Were these 22 villages excluded from the decree? It is quite clear that Reazoon brought her suit for fifteen-sixteenths of the whole zemindari belonging to her husband, these 22 villages. It is equally clear that, when she parted with her interest in 7½ annas in favor of the plaintiff's father, under the *ikrar* or *sharakatnama* of 16th Chaitra 1239 (28th March 1833), she transferred her and her son's whole rights in that share of the zemindari, and consequently the plaintiff's father was under the terms of that deed entitled to a 7½-anna share of those 22 villages, as well as in the remainder of the zemindari. The *sharakatnama* provided for the contingency that Reazoon might not get all she sued for, and therefore it was agreed that Khajeh Alim Oolah should obtain half of whatever Reazoon recovered."

After reciting the decree of 31st December 1834, so far as the same was material, His Lordship proceeded :—

"Now it is clear from the terms of this decree that the possession of these 22 villages held by Shumssoonissa under the *kabinama* of her husband Fyz Ali Khan, bearing date the 3rd Pous 1220 B. S. (16th

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December 1813) was not awarded to Reazoon, but it must be remembered that Fyz Ali had not surrendered all his rights as proprietor in these villages, but as admitted by all parties, had reserved to himself a rent of Rs 49, thereby declaring that his wife Shumsoonissa held them as a *mokurrari*, the rent of which was payable to him as zemandar. The decree of the Sudder Court, though refusing to give Reazoon and Sadut Ali possession of these villages, did not deprive them of their right to receive their rent as proprietors, a right in which the plaintiff, under the terms of the *sharakatnama* entered into between him and Reazoon, was entitled to partake according to the extent of his share."

His Lordship then referred to particular parts of the evidence in the case, as showing that the claim made by the now respondent in this suit had on several occasions previously been acknowledged by the appellant, and proceeded :—

'It appears to me unnecessary to refer to further documents to determine the nature of this tenure, or to establish the right of the plaintiff as proprietor to receive a share of the rent in proportion to the share of the zemindari rights transferred to him under the *sharakatnama* of Chaitra 1239 B. S. (March 1833), and subsequent *ikrar* of Asar 1245 (June 1838), amounting to 7 annas out of the 15 annas recovered by Reazoon Khanum."

He then proceeded thus :—

"The only question which remains to be determined is whether, as contended for by the defendants, he is prevented from asserting that right by the law of limitation. Now, on referring to a *vazinama* dated 8th Pous 1261 (22nd December 1854) filed by Sadut Ali and the plaintiff, after the latter had obtained a decree for possession with mesne profits of the 7-anna share of the zemindari transferred to him by Reazoon, I find that Sadut Ali agreed to pay Rs. 70,000 to the plaintiff after receiving a remission of Rs. 1,48,574 by instalments, of which the first (Rs. 28,000) was to be paid immediately, and the balance of Rs. 42,000 between the years 1261 and 1266 (1854—1859); this Rs. 70,000, representing, as observed by the Advocate-General, the 7-anna share of the plaintiff in the zemindari, exclusive of the 22 villages, and the share of rent due to him from these villages, there can be no doubt that this document admits the proprietary right of the plaintiff. Now, though it is very clear from the proceedings in the enhancement case of 1864 and 1865, that the plaintiff had received no rent on account of this tenure, yet Sadut Ali had admittedly received it up to the date of suit, and he received it knowing that he had no right to take what

belonged to the plaintiff, whose right, as proprietor, he had previously admitted, and did so in the enhancement suit. It may be questionable how far the plaintiff can, after a lapse of years, recover from Sadut Ali the rents that he has realised from the tenant; but as the plaintiff is proved to be a proprietor, he is entitled to a share in the rent of which I do not think Sadut Ali's past misappropriation can deprive him for the future. The plaintiffs proprietary right being determined, I do not see how limitation can apply to any claim he may make for rent, and as Sadut Ali, from whom Zamoorudoonissa derived her title, admitted, within 12 years before the bringing of the present suit, the plaintiff's proprietary rights, this suit to establish that right cannot be held to be barred by limitation."

Having thus decided on both the merits and the legal points in favor of the present respondent, the judgment concluded as follows :—

"I hold, therefore that this suit is not barred by limitation; that the 22 villages in suit comprise a tenure situated within, and being part of, and paying a rent of Rs. 49 to the proprietors of, the zemindari No. 10, Pergunna Atteeah, and that the plaintiff, as a proprietor of 7 annas out of 15 annas of that zemindari and as proprietor, is entitled to a share of the rent of this tenure, in proportion to his interest in the estate. I would, therefore, reverse the order of the lower Court, and decree the plaintiff's claim with costs."

The formal decree ordered that the said appeal be decreed, and the decree of the lower Court reversed, and it declared that the 22 villages in suit comprised a tenure situated within, and being part of, and paying a rent of Rs. 49 to the proprietors of, No. 10 on the *tauji* of the Collector of Mymensing, comprising As. 5-1-1-1 of Pergunna Atteeah. And it further declared that the plaintiff (the now respondent) was a proprietor of 7 annas out of 15 annas of that zemindari; and that as proprietor he was entitled to a share of the rent of this tenure in proportion to his interest in the estate. And it further ordered and decreed that the defendant (the now appellant) should pay to the plaintiff (the now respondent) such costs as in the said decree mentioned. And that a memorandum of that decree be forwarded to the Registrar of Deeds, within whose jurisdiction the property affected by the decree was situated.

Against this decree the defendant appealed to Her Majesty in Council.

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Mr. Leith, Q. C., and Mr. Doynes for the appellant.

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The two points especially pressed upon the Court were as to the suit being barred by the law of limitation, and as to its not being the subject for a declaratory decree. As to limitation it was contended that the compromise could not take the case out of the law of limitation, the latest item of the rent, which could have been inserted in the sum for which the compromise was made must have been rent which had accrued more than 12 years before the suit. Payment was not a ground for reviving a debt so as to bar the statute; see the cases collected in Broughton's Civil Procedure, App., 567. But it was not a payment on account, if payment could prevent the law of limitation applying. As to being entitled to a declaratory decree, it was a matter in the discretion of the Court to grant such decree, see *Sreenarain Mitter v. Sreemutty Kishen Soondery Dosses* (1), decided by the Judicial Committee a few days ago; but it is also necessary that consequential relief could be granted ancillary to that. But such discretion must be properly exercised, and this was not a case in which such a decree ought to have been made.

Mr. Cowie and Mr. Romer for the respondent.

The second appeal arose out of the following circumstances:—
Soon after the appellant in the first appeal had applied for leave to appeal to England, the respondent in the first appeal issued to the respondent in the second appeal, the following notice dated 3rd April 1868:—

"To Zamoorudoonissa Khanum, wife of Sadut Ali Khan, inhabitant of Gorye, at present residing at Kuroteea, Pergunnah Atteeah, Station Pakoolya, Zillah Mymensing.

"This is to inform you that a share of 7 annas of the 16 annas of the zemindari No. 10 of Pergunnah Atteeah, &c., within the jurisdiction of the Collectorate of Zillah Mymensing, consisting of a share of As. 5-1-1-1 for which the Government revenue is fixed at Rs. 18,289-5-9 is owned and possessed by me. You are in possession of the 22 mauzas and kismuts, viz. Russoolpore, &c., mentioned in the

(1) *Ante*, p. 171.

schedule, at the rent of Rs. 49, on the allegation that they constitute the right of Shumsoonissa under a *kabinama*, and that they were purchased by you. Whereas, the said rent is not *mokurrari* (fixed), and whatever right Shumsoonissa Khanum had, has been extinguished by her death, and you are not making any settlement of the rent or agreement with me, then calculating the total annual rent at Rs. 10,300-1-4-2-2, at the proper rate current in the lands of similar description surrounding the lands of the 22 mauzas and kismuts mentioned in the schedule, the rent of Rs. 4,532-11-1 of the said 7-anna share is annually due to me from you. Therefore, you do, within 15 days appear, either personally or by an authorised agent, at my zemindari collection office at Jamrookee of Pergunna Atteah, and, making a settlement of the said rent according to practice, do pay the rent, or else, according to the law, the rent mentioned in the notice will be demanded and realized from you from the beginning of 1275 B.S., (April 1868), according to the instalments current in the pergunna with interest at the rate of 2 per cent. per mensem, and no objection thereto by you will be heard. Dated 22nd Chaitra 1274 (3rd April 1868)."

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On the 28th June 1869, the appellant in the second appeal filed his plaint in the present suit against the respondent.

The plaint was as follows :—

"Suit for assessment of rent according to a notice, and for recovery of the sum of Rs. 4,532-11-1 as rent for the year 1275 (1868-1869), mentioned therein, as well as of Rs. 721-9 as interest thereon making a total of Rs. 5,254-4-1.

"That a 7-anna share out of As. 5-1-1-1, converted into 16 annas of zemindari No. 10, consisting of Pergunnas Atteah, &c., is owned and held by your petitioner in the capacity of a *mutwalli* (curator), while the defendant is in possession of the 2 mauzas and kismuts, Russool-pore, &c., appertaining to the said zemindari and named in the notice, at an admitted annual jumma of Rs. 49, without entering into any settlement with him for the lands and jumma covered by his said share, and on the allegation that they constitute a talook, created under a *kabinama* in favor of Shumsoonissa, and purchased by her; that, inasmuch as this alleged jumma is not a fixed one, as it is considerably lower than the Government revenue, and the rates current in the pergunna, and as the death of Shumsoonissa has extinguished her said jummai rights, your petitioner did, on the 28th Chaitra 1274 (9th April 1868), serve, in due form, a notice of the 22nd idem at the

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residence of the defendant; through the Deputy Collector of Jamalpore, in the district of Mymensing, fixing in the said notice, as per specification given below, an aggregate jumma of Rs. 10,300-1-4-2-2, upon the *khaddas* 973-4 of land comprised within the mouzas and kismuts mentioned above, and a proportionate yearly rental of Rs. 4,532-11-6 upon the 7-anna share of your petitioner at the rates fairly prevailing in surrounding lands of a similar description in the pergunna, and, further, annexing thereto a condition to the effect that the defendant should, within a period of 15 days, appear in person or through an authorised agent, and conclude a settlement in respect of the said lands and jumma; and that, in the event of her failure she should pay to your petitioner the jumma specified in the notice from the commencement of 1275 (April 1868), according to the instalments current in the pergunna, together with interest thereon at the rate of 2 per cent. per mensem; that, notwithstanding this notice, the defendant has failed to make her appearance and to tender a *kabuliat* for the said lands and jumma, or to pay her rents, and that consequently, your petitioner is entitled to recover from her, under the provisions of s. 51 of Regulation VIII of 1793, the sum of, Rs. 4,532-11-6 as principal of the rents from Baisakh to Chaitra 1275 (12th April 1868 to 11th April 1869) mentioned in the said notice; and also Rs. 721-9 as interest upon the lapsed instalments, as per account, making in all Rs. 5,254-4-1; together with his costs of the suit and future interest."

On the 30th August 1869, the appellant petitioned to be allowed to withdraw his reference to s. 51 of Regulation VIII of 1793; but did not then or at any time state under what law or right he sought to enhance respondent's rent.

In the schedule to the plaint were set out the 22 mauzas in suit. Those of Kaootengur, Kootubpore, and Arrah Rughoo appeared to be the three mauzas substituted by the agreement of the 24th Kartik 1221 (8th November 1814), the other 19 corresponded with 19 of those included in Shamssoonissa's *kablnama*, or deed of dower.

The respondent, by her written statement objected (*inter alia*), that the suit would not lie because the plaintiff had not specified in his notice his grounds of enhancement under Regulation VIII of 1793, s. 51, and that s. 17 of Act X of 1859, to which the notice did refer, did not apply to the case of a holding like

the respondent's (s. 17 of Act X of 1859 is limited to cases of occupying ryots); that the respondent's tenure was one at a fixed rent as had been held by the High Court previously, and that the plaintiff could not again put that in issue; that the rent of Rs. 49 had been fixed upon the talook by Fyz Ali Khan, and that the plaintiff who came in upon the same title was bound by that grant; and that it was not true that the grant to Shumsoonisissa was only for her life, and that since her death the respondent and her husband had enjoyed the tenure for 22 years, at a uniform rent of Rs. 49.

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On the 7th August 1869, three issues were framed:—

The first was as to due service of notice of enhancement.

The second as to whether enhancement was or was not barred by the agreement of the year 1221 (1814).

And the third was as to the proper rate of rent, supposing the plaintiff to be entitled to enhance.

Subsequently a fourth issue was raised, as to whether the matter of the right to enhance had not been previously decided against the plaintiff by a competent Court so as to bar him from raising it again.

The original agreement of 1221 1814, was, at the request of the respondent, sent for by the Principal Sudder Ameen, from the Collector's Court, where it had lain since 1836, in the record of the case disposed of by the Collector by an order of the 16th May of that year, from which it appeared that the Collector was then satisfied of the right of Shumsoonissa to hold the talook now in dispute, at the rent fixed by her husband of Rs. 49.

A copy of a proceeding of the Judge of Mymensing, dated the 17th November 1840, not before put in evidence, was filed by the respondent, by which it appeared that, on the application of Hedaet Oolah, brother of Shumsoonissa, deceased,—Sadut Ali and the present appellant's father opposing,—the talook now in suit, therein called the *kabin* mehals, was released from attachment and given up to Hedaet Oolah, to be held by him at the previous rent of Rs. 49, until there should be a decision of a competent Court enhancing it.

On the 31st August 1869, the respondent's husband filed a petition of intervention, and asked to be made a party to the

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suit, which he submitted affected his interest as theretofore the sole recipient of the rent payable in respect of the talook, and referred to the previous litigation in proof of his assertion, but no order was made.

On the 16th November 1861, the Deputy Collector delivered judgment and dismissed the appellant's suit. The Deputy Collector in his judgment, remarked on the variance between the plaint and the notice of enhancement, as to the particular law under which the plaintiff claimed the right to enhance, and to the inability of the plaintiff's pleader to specify any law other than that of equity and good conscience, but expressed his opinion that the case ought not to be stopped on that ground. He then held that there had been no previous conclusive adjudication as to the right of the plaintiff to enhance, and that the service of the notice of enhancement had been proved and then addressed himself to the "main point involved in the third issue, namely, whether the talook is liable to enhancement of rent." And he observed that "the decision of this question will depend on the genuineness of the *kabin* and *ikrar* given by Fyz Ali to Shumsoonissa being established, and the comprehensiveness and clear nature of their contents to bar enhancement being determined." He then decided that the *ikrar* was genuine, and that according to its due construction not a life-tenure to Shumsoonissa, but a permanent talook at a fixed rent of Rs. 49 had been created, and he accordingly dismissed the suit.

From this Judgment the plaintiff Khajeh Abdool Gunny appealed to the High Court. His grounds of appeal related wholly to the proof and construction of the *ikrar*.

On the 26th August 1870, a Division Bench Phear and E. Jackson, JJ.) delivered judgment and dismissed the appeal.

Phear, J. in his judgment, first observed on the uncertain and varying manner in which the claim had been preferred, as being "little creditable to the plaintiff," and on the absence of all express statement on the plaintiff's part, as to "what was the actual nature of the defendant's tenure in the 22 villages," while in fact he, by bringing this suit admitted that the defendant held "in some form of tenancy," and, by his

reference to s. 51 of Regulation VIII of 1793, admitted the tenure to be that of a talookdar. And the learned Judge expressed his opinion that the suit ought to be dismissed simply for the insufficiency of the notice of enhancement. The judgment then proceeded :—

"If, however, we go on to a consideration of the merits of the case, it appears to me that the defendant has very satisfactorily made out her claim to hold the lands, which are the subject of suit, by perpetual hereditary tenure at a fixed rent. I have no doubt that we ought, on the evidence before us, to hold that the *ikrar* is genuine. That document is, I think, rightly before the Court as evidence. It does not stand simply in the position of a document which appears on the file of the suit without the support of any testimony to speak to its antecedents. We know a great deal of its past history. We gather from the records of suit, to which both sides appeal (and indeed it is admitted by the plaintiff himself) that this *ikrar* was produced in Court in certain legal proceedings so far back as 1836, by the party who then claimed to hold the 22 mehals of this suit by the same title as the present defendant now claims them, and also that throughout the years of persistent litigation which have intervened from that time to this, the persons into whose hands these mehals have successively come, have treated and relied upon this document as one of their title-deeds. It is true that, during the same interval, the zemindar for the time being (and for the purposes of this suit, the plaintiff holds this character) has very frequently and very forcibly denied the genuineness of the *ikrarname*, but so far as I can discover, he has never adduced any other evidence in disproof of the genuineness than such as may be supplied by the apparently admitted fact that, notwithstanding the occurrence of several years of litigation between the date which the document purports to bear and the year 1836, it was never even referred to, or spoken of, until it was produced at the latter date. I may presently make a remark upon the value of this evidence. For the present I will only say that, whatever it may be worth, it seems to me out-weighed by the counter-fact that for the last 34 years at least the defendant and her predecessors have, in the face of the fiercest opposition, asserted a right to hold the 22 particular mehals, which are the subject of the present suit, under the terms of this *ikrarname*; that in the end they have certainly succeeded in getting their right to some tenure in these mehals recognized on all sides, and that the plaintiff admits this by the act of bringing this suit. But no other title to all these 22 mehals is suggested by any one

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than that which the *ikrarname* furnishes; the *kabinama* only covers 19 of them; and if the *ikrarname* be put on one side, no one can give the smallest account how the three mehals of the tenure, which are not in the *kabinama*, came to be substituted for three which are there. The matter seems in effect to stand thus:—The defendant says, 'I hold these 22 mehals under this title-deed. I got the deed from my predecessors in estate with the mehals. It was produced 34 years ago when your predecessor denied that mine had any right whatever to these mehals, and I have always paid rent according to its terms.' The plaintiff replies, 'I am obliged to admit now that you have some sort of tenure in those mehals, though I don't know how you got three of them, and that you have been paying, in respect of the whole, the rent specified in that alleged deed; but I say, as I have all along said, you did not get the mehals or any of them under that deed, because if you had done so, you would, under the circumstances of the case, have produced the deed long before 1836.' Considering that the plaintiff now represents the person who originally created the tenure, I think that, on the state of things just mentioned, we must accept the *ikrarname* as constituting the foundation of the defendant's right."

The learned Judge then referred to the fact that the deed of dower, which was not disputed in fact, gave a preferable interest to that given by the *ikrar*, and that the forgery of the latter would have been purposeless, and expressed a doubt as to whether the appellant was not, as a purchaser from Sadut Ali after the latter had conveyed the talook to this respondent, precluded from raising this question in the same way as Sadut Ali would be. And in conclusion, the learned Judge held that the respondent was entitled to an hereditary tenure at a fixed rent; and, the other learned Judge agreeing in this conclusion, the appeal was dismissed with costs.

The plaintiff appealed to Her Majesty in Council.

Mr. Cowie and Mr. Romer for the appellant.

The respondent admits herself to be an intermediate tenant of the zemindari in respect of the 22 mauzas mentioned in the notice of enhancement, and is therefore liable and bound in equity and justice to pay a fair rent for the same. The rent specified in the notice is proved to be fair. The *ikrar* was a

forgery, and Phear, J., erred in judging of the effect of the admission of the appellant which only amounted to this, that the respondent was in possession as a tenant of the zemindari by her own admission, and that the appellant had no objection to allow her to remain if she paid a proper rent. Even if the *ikrar* were valid, it conveyed no interest in the mauzas beyond the life of the now deceased Shumsoonissa, and it only fixed the rent of Rs. 49 as a rent to be paid during the pleasure of Fyz Ali Khan, or at most during his life and could not bind the zemindar after his death. On Sadut Ali Khan purchasing the zemindari in April 1847, whatever interest was created by the *ikrar* or *kabinama* merged.

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Mr. Leith, Q.C., and Mr. Doyme for the respondent.

Their LORDSHIPS gave the following judgment in both appeals:—

In delivering judgment upon these appeals, their Lordships think it necessary, in the first place, briefly to review the history of this litigation.

Fyz Ali Khan, a Mahomedan zemindar, in the district of Mymensing, died on the 16th of December 1824, leaving two widows and a son. The son is the appellant in the first, and the husband of the respondent in the second, appeal. The widows were Shumsoonissa and Reazoon, who was the mother of the appellant Sadut Ali Khan. Fyz Ali Khan, upon the occasion of his marriage with Shumsoonissa Begum, had contracted to give her a certain dower, of which one-third was to be prompt; and it appears to have been agreed on the same occasion that he should, in satisfaction of that portion of the dower which was prompt, make over to her, as he accordingly did make over by a *kabinama*, 22 villages forming part of his zemindari. A partition was then in the course of being made between him and his co-sharers in the larger zemindari of which that property which, for the purposes of this suit, may be called his zemindari, was part; on that partition three of the villages comprised in the *kabinama* fell to the lot of one of his co-sharers; and it is contended on the

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part of Sadut Ali that thereupon an *ikrarnama* was, a year after the marriage, executed by Fyz Ali, by which he substituted three other villages forming part of his *zemindari* in the place of those three villages, and created a sub-tenure or dependant talook out of the 22 villages, as then constituted under the name of Russoolpore, on which he received a gross rent of Rs. 49.

In the second suit a considerable contest has been raised as to the genuineness of the *ikrarnama*, but it is perfectly certain that, by some means or another, the substitution of the three new villages for the three former villages did take place; and that whereas the *kabinama* was silent as to the reservation of any rent, the 22 villages were afterwards held upon the terms of paying a rent of Rs. 49. It will be more convenient, since it is necessary to keep the two appeals in some measure distinct, to consider the objections made to the genuineness of the *ikrarnama* when their Lordships come to consider that suit, and to assume that, either by the *ikrarnama* or some other means, the 22 villages really did become a sub-tenure paying one rent of Rs. 49.

Immediately upon the death of Fyz Ali there began a litigation concerning his estate, which has continued nearly up to this time, and constitutes an amount of litigation concerning one estate which one would vainly hope is singular even in India. Their Lordships do not think it necessary to go through the history of that litigation further than may be required in order to show the precise relation in which the parties to these appeals stand to each other.

The first suit was brought by Reazoon Begum, on her own behalf and as guardian of her infant son Sadut Ali, against Shumsoonissa Begum, who had got into possession of the whole estate; and had called in question the marriage of Reazoon with Fyz Ali, and the legitimacy of Sadut Ali, in order to establish the right of herself and her son to share in the estate. That suit went through all the Indian Courts, and was ultimately brought before this Committee. In 1844 Her Majesty made a final order affirming the decisions of the Indian Courts, which were in favor of the rights claimed by the plaintiffs.

Pending that litigation, Khajeh Azim Oolah, the father of the party who is the respondent in the first appeal, and the appellant in the second appeal, had made advances to Reazoon for the purpose of enabling her carry on her suit; and, as is usual in India, those advances ended in an arrangement by which she agreed to give him one moiety of what should be recovered in that suit. That agreement was afterwards confirmed by Sadut Ali Khan upon obtaining his majority; and there is no question now upon the present appeals that it was a good and binding agreement, and that it was the foundation of the title of the present Khajeh, who was succeeded to the rights of his father.

It is not immaterial, with reference to some of the arguments which have been addressed to their Lordships at the bar, to observe that, although the agreement was originally for one moiety, which would be $7\frac{1}{2}$ annas of the 15 annas which were finally decreed to the mother and her son, the Khajeh, upon a representation founded on the existence of the sub-tenure and the poverty of Reazoon and her son, agreed to waive his rights as to half an anna, and that the ultimate arrangement was that he should take only 7 of the 15 annas. It is therefore clear that the ultimate contract between the parties was made with a full knowledge of the existence of the sub-tenure. And if matters had remained as they then were, the rights of the parties would have stood thus:—Reazoon Begum would have been entitled to 1 anna of the zemindari right; Shummsoonissa Begum would have been entitled to another anna of the zemindari right and also to the talookdari interest in the villages; Sadut Ali Khan would have been entitled to 7 annas of the zemindari right; and Khajeh Abdool would have been entitled to 7 annas of the zemindari right.

It had been expressly provided by the original decree of the Sudder Court, which was affirmed by Her Majesty in Council, that the villages which formed the sub-tenure were to be taken as separated from the *corpus* of the estate, subject of course to any rent which might be payable in respect of them to the zemindars; and the division of the assets of the zemindari

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between Reazoon and her son on the one side, and Shumssoonissa on the other, was accordingly made on that footing. The position of the parties, however, was afterwards changed. Shumssoonissa Begum had died pending her appeal to Her Majesty in Council. It was prosecuted by her heir and brother Hedaet Oolah; and he having failed to pay, pursuant to the order in Council, the costs of the appeal, her interest in Fyz Ali's estate which had descended to him, and of which he was then in possession, was attached and put up to sale. It was bought by Sadut Ali, who afterwards transferred the sub tenure, and possibly the whole of what he bought, to his wife, who is the respondent in the second appeal.

There is some evidence that in the first instance the Khajeh was put into some kind of constructive possession of the 7 annas of the zemindari which had been assigned to him; disputes afterwards took place between the parties, and he found it necessary to bring a suit in order to enforce his rights under the purchase. In that suit a final decree was made in his favor in 1853. Thereupon the rights and position of the parties seem to have been as follows:—The wife of Sadut Ali Khan, Zamoorudoonissa, as the holder of the sub-tenure, was entitled to the beneficial interest therein; but whatever rent was payable by her to the zemindari was divisible between those entitled to the zemindari according to their respective shares; the appellant being entitled to 7 annas of that rent, whatever it might be. As soon as the decree had been made in his favor, he seems to have conceived the notion that he was entitled as zemindar to enhance that rent; and he took proceedings on two occasions, before he brought the suit which has given rise to the first appeal, in order to establish his right to enhance. He was unsuccessful upon both occasions; and upon the last doubt was thrown upon his title to claim a zemindari right in respect of the villages included in the sub-tenure. Thereupon he instituted the suit out of which the first appeal has arisen.

The defendants in that suit, Sadut Ali Khan and his wife, although, as will presently be shown, they had on a former occasion admitted the plaintiff's right to share in the rent reserved on the 22 villages, saw fit to contest that right, and alleged that no

zemindari right in respect of the village had passed under the purchase to Khajeh Azim Oolah. They also contended that, if any had passed, the plaintiff had never received any rents, and that by reason of his non-reception of any share of the rent for a period of more than 12 years, his suit was barred by limitation. Formal issues were settled to raise these defences, and the cause was tried upon them. These were the real points upon which the case was fought in the Courts below; and it has now been admitted at the bar by Mr. Leith that he cannot support the first of them. It is then conceded that, by reason of the transfer to the Khajeh of the 7-anna share in the zemindari, he became entitled to a proportionate share of the Rs. 49 reserved upon the 22 villages. It was however contended and fully argued by Mr. Doyne that the suit was barred by the statute of limitations. Their Lordships have fully considered the able argument that was addressed to them upon that point, and they are not satisfied that the statute of limitations was a bar to the suit. The circumstance which was chiefly relied upon by the High Court and made the principal ground for their judgment, was that in the course of the suit which the Khajeh brought to enforce his rights under the agreement for purchase, a large sum for mesne profits became due from Sadut Ali Khan to him; that ultimately there was a compromise between them which fixed the amount to be paid at, I think, Rs. 70,000, which sum was actually paid to him within the 12 years. It was argued, however, by Mr. Doyne that the last item of the rent of the villages which could have entered in into the sum for which that compromise was made must have been rent which had accrued more than 12 years before the commencement of the suit. Their Lordships are nevertheless not disposed to dispute the view of the High Court that the payment of the sum taken to include the arrears of that rent within the 12 years was evidence of a recognition of the title of the Khajeh to the rent, which is sufficient to exclude the notion of an adverse possession for more than 12 years before the institution of this suit. The case, however, of the respondent does not appear to their Lordships to depend solely upon that admission. There has been throughout this long litigation a good deal of what one may call

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blowing hot and cold ; and it certainly appears that in the first of the proceedings which were taken anterior to the suit for the purpose of enhancing the rent, the contention of the defendants was this :—"True, you are entitled as zemindar to a proportionate share of the existing rent of this talook, but you are not entitled to enhance that rent." Therefore, it appears to their Lordships that this is not a case to which the statute of limitations could fairly or properly be applied.

That disposes of the points which were really the grounds of defence taken in the Courts in India. It was, however, strenuously argued that the suit ought to fail, because it is a suit for a mere declaratory decree seeking no consequential relief. And the objection, as their Lordships gather, which was so taken at the bar was two-fold ; first, that no such suit would lie unless some consequential relief could be granted as ancillary to it ; and, secondly, that to entertain such a suit is a matter of discretion in the Court, and that the Court had in this instance exercised its discretion unsoundly.

Now, with respect to the last of these objections, it might be sufficient to say that, if the High Court has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion. Nor assuming that there was a discretion to entertain the suit, do their Lordships think that in this case it was unsoundly exercised ? The respondent in his last suit for enhancement had been turned round and the ground that he had not any zemindari right in these villages, and he naturally came into the Civil Court in order to have that right ascertained and declared. And if his suit had been dismissed after the parties had joined in the issues in which they did join, the decree would have been a bar to his right to recover even his proportionate share of the rent of the Rs. 49.

Their Lordships have now to consider the first objection.

It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit ; otherwise the 15th section of the Code of Civil Procedure would have no operation

at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous provision of the English statute is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the zamindari title.

Therefore upon both grounds it appeared to their Lordships yesterday on the close of the appellant's case that he had failed to shew any reason for disturbing the decision of the High Court in the first suit, and that the decree which was the subject of this appeal ought to be affirmed.

Now it is not unimportant with reference to the second appeal to see what that decree was. It is in these words :—"It is ordered and decreed by the said Court that this appeal be decreed, and the decree of the lower Court be reversed. And it is declared that the 22 villages in the suit comprise a tenure situated within, and being part of, and paying a rent of Rs. 49 to the proprietors of the zamindari No. 10 on the *tauzi* of the Collector of Mymensing comprising As. 5-1-1-1 of Pergunna Atteeah. And it is further declared that plaintiff is a proprietor of 7 annas out of 15 annas of that zamindari, and that as proprietor he is entitled to a share of the rent of this tenure in proportion to his interest in the estate." It seems to their Lordships impossible for the appellant who was the plaintiff in the second suit to go behind that decree, and to say that the 22 villages did not constitute a tenure within the zamindari, on which a gross rent of Rs. 49 was reversed to the zamindars.

Having got this decree the Khajeh proceeded to bring his suit for enhancement against Zamoorudoonissa Begum, as the holder of the tenure. Among the issues settled in that suit, there were these :—1st. Whether the notice had specified the particulars required by law to be specified, and whether it had

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been duly served? And the 2nd, which was the material one, in these words:—"Are the villages in question liable to enhancement of rent as stated by the plaintiff, or fit to be exempted from increased assessment, being held by defendant at a fixed rate in perpetuity under a *likhan* granted by the former semindar." The notice, it was admitted, was a notice which was necessarily given under the 13th section of Act X of 1859. In the view their Lordships have taken of the second issue it is not necessary for them to consider whether that notice was sufficient. The Deputy Collector, who tried the case in the first instance, considered that it was sufficient. Some doubt was thrown upon that by Phear, J., in the High Court. He seems to have considered it insufficient; but their Lordships think it will be far more satisfactory to decide this case upon its merits, and the question raised by the second issue, *viz.*, whether the rent is enhanceable or not, in a suit regularly framed.

The foundation of the tenant's title was the *kabinama*; and the transaction upon the face of the *kabinama* was a transfer of the 22 villages included in it to Shumsounissa in satisfaction of the one-third of her agreed dower. It did not reserve any rent whatever. It did not make any mention of or provision for the payment of the Government revenue payable in respect of those particular villages; and though it did not contain any words of inheritance in the strict sense of the term, it did not contain any express direction that the enjoyment of the villages granted should be limited to any particular time. The nature of the transaction affords strong ground for the conclusion that the villages were intended to be made over absolutely, and for all time; because the woman was entitled to the third of her dower absolutely. She might have disposed of that as she pleased; and when, in lieu of that she took a grant of the villages, the presumption is that she was intended to take an absolute interest. Again, the hereditary nature of her interest seems to be almost put beyond a doubt by the decree in the first suit, which is the foundation of the Khajeh's title, because when she died, her heir, who was appointed to carry on the suit in her place, did so, and the decree

contains a direction concerning these villages, notwithstanding her demise, which implies the existence of the tenure. Nor does the hereditary character of the tenure seem to have been disputed up to the present time. It may seem strange that no provision was made expressly in the instrument for the payment of the Government revenue. But the zemindar may have been willing to take the whole of the Government revenue upon himself; and his doing this may have been an element in the settlement of the terms upon which the third of the dower was to be given up. Of course, such a transaction might be impeached by a purchaser of the zemindari for arrears of Government revenue. But it is nevertheless good against all who claim title under Fyz Ali Khan. Nor can the fact that the instrument is silent concerning the payment of the Government revenue affect the questions raised by this appeal; because, even if the grant be taken to be a grant of the villages subject to the payment of the Government revenue, and the zemindar may have paid the Government revenue on account of the tenant, his right to recover what he has so paid could not enter into a suit for enhancement of rent, but would be a matter for which he must seek his remedy in a Civil Court.

The question of the *ikrarnama* is now to be considered. Their Lordships find that the validity of this instrument has been affirmed by the concurrent judgment of both the Indian Courts. They do not deny that there may be circumstances which throw some suspicion upon it, or that it is a document which has not satisfied all the officers before whom it appears to have been produced; but upon the whole they can see no sufficient grounds for disturbing the finding of the Courts below. The plaintiff cannot be heard to say that there was not a substitution of three villages for three of those included in the *kabinama*; or that the 22 villages were not afterwards held as a sub-tenure on which a rent was reserved. He comes into the Court, having got a declaration in the other suit that such was the fact, and alleging that by reason of it the relation of landlord and tenant subsisted between him and the defendant, and he fails to show by what means other than the *ikrarnama* the substitution of the

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villages and the creation of the tenure took place. Therefore, it seems to their Lordships that they must accept the *ikraanama* as established, and act upon it accordingly. If they do that, it appears to them that, inasmuch as the *ikraanama* declares the rent to be permanent, the case for enhancement altogether fails, and that the decree of the Indian Courts in the second suit ought also to be affirmed.

The result will be that their Lordships will humbly advise Her Majesty to affirm both the decrees under appeal, and to dismiss each appeal with costs.

Appeals dismissed.

Agent for appellant in the first, and respondent in the second, appeal: Mr. Oehme.

Agents for respondent in the first, and appellant in the second, appeal: Messrs. J. S. and A. P. Judge.

ORIGINAL CIVIL.

Before Sir B. Couch, Kt., Chief Justice, and Mr. Justice Markby.

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 Feby. 14.

IN THE MATTER OF THE LAND ACQUISITION ACT (X OF 1870.)

HEYSHAM v. BHOLANATH MULLICK.

BHOLANATH MULLICK v. HEYSHAM.

Land Acquisition Act (X of 1870), ss. 30, 35—Appeal—Difference of Opinion between Judge and Assessors—Compensation—Evidence, taking down—Act VIII of 1859, s. 172.

Under s. 30, Act X of 1870, an appeal lies from the decision of the Judge where the differs from the Assessors, whether the Assessors agree with one another or not.

THESE were appeals under the Land Acquisition Act (X of 1870) from the decision of N. H. Thomson, Esq., one of the Judges of the Small Cause Court, Calcutta, who had been appointed to hear cases under the Act.

The Justices had ordered certain land to be taken for the purpose of making a municipal market, and the Collector, Mr. Heysham, issued a notice, under s. 9 of the Land Acquisition Act, to all the persons claiming compensation in respect of the land proposed to be taken. Six claimants appeared, and of them four accepted the amount of compensation tendered them. The other two claimants, of whom Bholanath Mullick was one, refused to accept the amount offered, and their claims were referred by the Collector, under s. 15 of the Act, for the determination of the Court.

The amount of compensation tendered by the Collector was Rs. 71,512-6-4.

The following was the substance of the Assessors' opinion :—

Mr. Clarke considered the mode adopted by the Collector in valuing the land, supposing it to be fairly occupied, and yielding as much as under ordinary circumstances it could be expected to yield, viz., by awarding a sum which invested in Government securities would yield equal revenue, was a method of awarding compensation to the owner, not only just, but liberal ; that the sum which the owner was deriving as rent from the land, viz., Rs. 424 a month, was a correct basis for estimating the market value of the land ; that, on the evidence, there was no ground for believing that, under the present circumstances, the land could reasonably be expected to yield more ; that the evidence established that 14 years' purchase was the ordinary market price of land in Calcutta, and in some instances less had been given ; and that looking at the price which was shown to have been paid by private individuals for land in the immediate neighbourhood, he estimated the gross annual value of the land at Rs. 5,088. From this he deducted 12 per cent. for taxes and collection charges, viz Rs 710, leaving a net annual value of Rs. 4,378, and allowing 16 years' purchase, awarded the claimant a sum of Rs. 70,048.

Baboo Jadoo all Mullick estimated the value of the land with reference to the probable rental which would be derived if the whole land was let out, allowing for space, for openings, and for by-ways. He thought that one-sixth was sufficient to allow for lanes and by-ways ; that the evidence showed that the land had

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been let on an average at Rs. 3-8 a *kata* a month, which, after deducting 12 per cent., would, at 16 years' purchase, give Rs. 591 *per kata*; that the deduction for lanes and openings would leave the price *per kata* at about Rs. 500; that Rs. 50 *per kata* should be deducted for the land occupied by the filled-up tank. He awarded accordingly Rs. 1,47,000 as the market value of the land.

Mr. Thomson thought that the estimate proposed by Baboo Jodoolall Mullick was considerably in excess of, and that of Mr. Clarke somewhat less than, what appeared from the evidence to be the market value of the land; that the valuation of the Collector was also too small; that there was ground for believing that, if fully let, the land might reasonably be expected to yield about one-sixth more than its present rental; that on this basis, and after deducting 12 per cent. for taxes and collection, the net annual value of the land would amount to Rs. 5,232; that, allowing on the evidence 18 years' purchase, the price to be given would be Rs. 94,176, or about Rs. 320 *per kata*. He awarded the claimant under cl. 1, s. 24, Act X of 1870, Rs. 94,176 as the market value of the land in question, and a further sum of Rs. 14,125 under s. 42, being 15 per cent. on the amount awarded in consideration of the compulsory nature of the acquisition. The Judge's total award was Rs. 1,08,301, with interest as provided by s. 42 at 6 per cent. per annum from the date when possession of the land was taken. He allowed Rs. 1,492-2-5 to the claimant for costs, and Rs. 300 to each of the Assessors for their services.

The *Advocate-General* (Mr. Graham) and Mr. Lowe for the appellant in the first, and respondent in the second, appeal.

Mr. Woodroffe and Mr. Marindin for the respondent in the first, and the appellant in the second, appeal.

Mr. Woodroffe in the first appeal took a preliminary objection that no appeal would lie in this case. The right of appeal is given by s. 35, Act X of 1870, and it is submitted that that section only applies to a case where the Judge has differed from

the Assessors as to the amount of compensation, and the Assessors have agreed, and not to a case like the present where the Judge has differed from both the Assessors as to the amount of compensation, and the Assessors have differed from each other. Another objection was taken that the evidence had not been taken down by the Judge in writing as provided by s. 172, Act VIII of 1859, which is made applicable to the procedure under Act X of 1870, and therefore could not be made use of on appeal. The cases of *In the matter of Adjudiaprasad* (1) and *In re Lakmidas Hauzraj* (2) were referred to.

Mr. Marindin on the same side.

The *Advocate-General, contra.*—The words of the Act are clear. If there was a difference of opinion as to the amount of compensation between the Judge and Assessors, and in this case there was, an appeal would lie; see s. 30. If the Legislature had wished to take away the right of appeal in such a case as this, they would have said so in express terms. S. 172, Act VIII of 1859, has been followed in this case. The Judge's notes of the evidence form part of the record in the case. The case of *In the matter of Adjudiaprasad* (1) was an appeal under the Insolvent Act, and was a case governed by a special Act, which contained strict provisions as to evidence (3). The respondent has himself appealed. [An agreement was come to at the suggestion of Couch, C. J., that the evidence taken down at the trial by the attorney for the respondent, to be supplemented or corrected by the Judge's notes, should be taken as the evidence in the case.]

Mr. Lowe on the same side.

Mr. Woodroffe in reply.

The judgment of the Court (on the preliminary point) was delivered by

COUCH, C.J.—The case of two Assessors differing as to the amount of the compensation, and the Judge entertaining a

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(1) 7 B. L. R., 74.

(2) 5 Bom. H. C., O. C., 63.

(3) See Insolvent Act (11 & 12 Vict., c. 21), s. 73.

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different opinion as to the amount of the compensation, is quite as likely, if not more likely, to arise, than the case of the Assessors differing from each other, and the Judge agreeing with one of them. Certainly, unless the language of this Act was very clear in excluding such a case as that, I should not come to the conclusion that the section did not apply to it. Now the two sections, 29 and 30, appear to be intended to embrace all the different cases which would arise. S. 29 provides :—" In case the Judge and one or both of the Assessors agree as to the amount of compensation, their decision thereon shall be final." The other section appears to provide for cases where the decision of the Judge should prevail. If we were to adopt what has been contended for by the respondent that this section and s. 35 do not apply where the Assessors do not agree, and there is only a difference of opinion between the Judge and both the Assessors, there would clearly be in this Act no direction as to what is to be done in that case. I think the Act should be read as meaning a difference of opinion between the Judge and the Assessors, whether the Assessors agree with each other or not. The ss. 29 and 30 so read will include all the different cases which can arise. Unless the language of the Act were very clear, I should not be disposed to put such a construction on it as to deprive the parties of the right of appeal when the Judge did not agree with the Assessors, and the latter did not agree with each other. In my opinion there is as much reason for giving an appeal when the Judge differs from the Assessors when they differ from each other, as when they agree. I take the Act to mean that the award shall not be final whenever there is a difference of opinion between the Judge and the Assesors. For these reasons I think an appeal does lie in this case.

The appeal was then argued on the merits, and the following judgment was delivered by

COUCH, C.J.—This case comes before us under the provisions of the land Acquisition Act, 1870, in consequence of the Judge of the Small Cause Court having differed from the Assessors as to the amount of compensation to be awarded, and both parties have appealed from the decision of the learned Judge.

We have considered the matter and the opinions of the learned Judge and both Assessors.

One of the Assessors, Mr. Clarke, in giving his opinion, takes the present rent as a correct basis for estimating the value of the land, and gives 16 years' purchase after deducting 12 per cent. for taxes and collection charges. He takes the rent at Rs. 424, which, according to the evidence, is produced by one half of the land which is the subject of compensation. Baboo Jodoolall Mullick, the other Assessor, estimates the value of the land upon the probable rental if the whole was let, allowing one-sixth for lanes and by-ways, and deducts the 12 per cent., and gives 16 years' purchase on the amount of the rental after the deduction. He also deducts Rs. 50 *per kata* for 100 feet by 120 feet, which he considers to be the extent of the land occupied by the filled-up tank. Both the Assessors take the rent at Rs. 424. We think that shows that they understood the witnesses who were called as proving, although there was some discrepancy, that that was the gross rental, and that taxes and the cost of collection ought to be deducted from that amount. It is also to be mentioned that Jodoolall Mullick, the Assessor whose opinion is very favorable to the claimant, and who is disposed to allow him all that he could possibly be entitled to, takes no notice of the *salami*. And as that does not appear in the books of the claimant, we think the Assessors were right in disallowing it, and we ought not to take it into consideration. The learned Judge of the Small Cause Court takes another view of the mode in which the amount of compensation ought to be assessed. He takes the present rent of one-half of the land, and adds one-sixth, which is equivalent to the rental of one-twelfth more of the property let at the same rate. In fact, he treats the matter as if the value of the land was to be calculated on the supposition that seven-twelfths only of it would constantly be let at the same rate as the half which is now let. He, in like manner, deducts 12 per cent. for taxes and collection charges, evidently sharing in the view of the Assessors that that amount ought to be deducted from the rent of Rs. 424. But he goes beyond Jodoolall Mullick with respect to the number of years' purchase, and gives 18 years. Now, with regard to that we

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think that the learned Judge has gone too far. Heralall Seal, one of the witnesses for the claimant, although in his examination-in-chief he put it as high as 18 years, says in cross-examination that at an average rate the land could have been bought at 14 or 15 years' purchase. We think, on the evidence, that 16 years' purchase would be a fair allowance. But in saying that 16 years' purchase is a fair allowance in this case, we must not be understood as laying that down as a rule in cases of this kind. Every case must depend on its own circumstances, on the evidence given and the nature of the property. The number of years' purchase which it would be right to allow with regard to one sort of property, might not be a fair allowance for other kinds of property, and we wish to guard ourselves against being understood as laying down any rule as to the number of years' purchase which ought to be allowed. On the evidence, we think that 16 years' purchase is sufficient to allow in the present case.

The other question which has to be considered is as to the deduction which should be made from the total quantity of land for what may be supposed to be generally unlet, and what would be required for lanes and by-ways. Mr. Rowe, one of the witnesses for the Justices, says that in tenanted lands about one-third is usually taken up by lanes and vacant lands, and it seems to us that the allowance of the learned Judge of the Small Cause Court for the land which may be expected to yield a rent is not sufficient. He has allowed too little, as Jodoolall Mullick has allowed too much; Jodoolall Mullick having deducted for only lanes and by-ways. We are of opinion that two-thirds of the land might reasonably be expected to be let upon an average number of years, although half only is now let; and in estimating the amount of compensation to be allowed, we think it right to take two-thirds of the land as let, and as the part unlet would probably be the worst part of the land, the two-thirds may fairly be expected to produce a rental at the same rate as the half now produces.

Applying these principles to the case, the result is this: the present rental of half the land is Rs. 424 a month. If to that we add one-third, which is equivalent to one-sixth of the whole land, we get the rental of two thirds of the whole. That sum is

Rs. 141-3-3, making a total of Rs. 565-3-3 as the monthly rental of the land. That makes an annual rental of Rs. 6,783-9-6, being little short of Rs. 6,784. Deducting from that 12 per cent. for taxes and collection charges amounting to Rs. 814-0-7, we have Rs. 5,969-8-9, which at, 6 years' purchase is Rs. 95,518-2-4, and that is the amount of compensation which we think ought to be awarded, to that the 15 per cent. is added, the amount is Rs. 1,09,845-9-7, which is the sum we consider ought to be awarded.

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In the Court below Rs. 1,492-2-5 was allowed to the claimant as costs, and to each of the Assessors Rs. 300. As we in fact give to the claimant more than the learned Judge gave, it is equally proper that he should have his costs. I do not know whether under the Act it is necessary for us to make any order about those costs, but in case of any doubt we confirm the allowance of costs. With regard to the costs of the appeal, we think the parties should pay their own costs.

Attorneys for Mr. Heysham : Messrs. *Berners & Co.*

Attorneys for Bholanath Mullick : Messrs. *Trotman & Co.*

APPELLATE CIVIL

Before Mr. Justice Markby and Mr. Justice Birch.

BRINDABUN CHUNDER ROY (PLAINTIFF) v. TARACHAND
BUNDOPADHYA (DEFENDANT).*

1873
May 13.

Act VII of 1859, s. 230—Possession—Title—Limitation.

The defendant purchased in 1856 from the Official Assignee certain property belonging to one *D*. In 1867, he brought a suit against the heirs of *D* for possession of the property purchased ; he obtained a decree in May 1869, under which he obtained possession in May 1870. In June 1870, the plaintiff filed a petition under s. 230, Act VIII of 1859, alleging that he had purchased the property claimed from the heirs of *D* in 1864, and had been in possession until he was ousted by the defendant, and that he was not a party to the suit

* Special Appeal, No. 1198 of 1872, from a decree of the Officiating Judge of East Burdwan, dated the 29th May 1872, affirming a decree of the Subordinate Judge of that district, dated the 30th September 1871.

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brought by the defendant in 1867. *Held* that the title of the defendant was barred, more than 12 years having elapsed from the date of his purchase, and that the plaintiff was entitled on mere proof of *bonâ fide* possession and that he was not a party to the suit by the defendant in 1867, to put the defendant to proof of his own title, and on the defendant's failing to prove his title, to be restored to possession.

Baboos *Romesh Chunder Mitter* and *Rashbehary Ghose* for the appellant.

The *Advocate-General*, offg. (Mr. Paul), Baboos *Kallyprosonno Dutt* and *Tarrucknath Sein* for the respondent.

THE facts and arguments are sufficiently stated in the judgments :—

MARKBY, J.—The facts of this case as stated to us are, that one Dad Ally, who was then owner of certain immoveable property, became insolvent in the year 1853.

The property now in suit was sold, together with several other properties, by the Official of Assignee, to one Tarachand, the defendant, in the year 1856.

In the year 1867, Tarachand commenced a suit to obtain possession under his purchase of this and the other properties. The suit was instituted against the heirs of Dad Ally; but several other persons applied to be made defendants in this suit, claiming various portions of the property under different titles. On the 14th May 1869, Tarachand obtained a final decree, which included the property now in suit. On the 19th May 1870, Tarachand, in execution of his decree, took possession of this property.

On the 16th June 1870, the plaintiff presented a petition under s. 230 of the Code of Civil Procedure, alleging that he was in *bonâ fide* possession of that portion of the property to which the present suit relates; and that he was not a party to the suit in which the former decree was passed. Accordingly his application was, as the Code directs, registered and numbered as a suit.

The plaintiff has now proved that, in execution of a decree passed in the year 1852 against Dad Ally, execution was taken

out after Dad Ally's death, under s. 210, against the heirs of Dad Ally, and that the property he now claims was sold in execution of that decree in the year 1864 : at that time the heirs of Dad Ally were in possession. The plaintiff took possession under his purchase, when exactly is not stated, but at some time prior to 1867. He was not made a party to the suit brought by the defendant in 1867. The District Judge thinks that the execution-creditors, when they took these proceedings in execution, must have known that Dad Ally's heirs were not entitled to the property ; but he says that it was stated on behalf of the defendant that no collusion or complicity was charged against the plaintiff.

Both the lower Courts have dismissed the suit.

The plaintiff appeals and raises two contentions : first, that the title of the defendant Tarachand was extinguished in favor of himself as soon as the twelve years from the date of his purchase had elapsed, and that he has, therefore, proved his title ; secondly, that under s. 230 he ought to be restored to possession, even without proof of title, upon proof that he was *bonâ fide* in possession, and that he was not a party to the suit.

The second point is, I think, stated too broadly, I am not prepared to say that, under s. 230, a party, who has been dispossessed in execution of a decree to which he is not a party, can, on mere proof of *bonâ fide* possession, claim to be restored. But I think he can, on mere proof of *bonâ fide* possession, call upon the defendant to prove his title, and that I understand to be the result of the judgment of the Chief Justice in *Radha Pyari Debi Chowdhraïn v. Nabin Chandra Chowdhry* (1).

The question, therefore, arises, has the defendant proved his title ? I think he has not. It seems to me that we cannot hold that he has done so without impugning doctrines that have been already clearly laid down in this Court and in the Privy Council. It has been laid down by the Privy Council, in the case of *Gunga Gobind Mundul v. The Collector of the 24 Pergunnahs* (2), that " the law has established a limitation of twelve years ; after that time it declares not simply that the remedy is barred,

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(1) 5 B. L. R., 708. (2) 11 Moore's I. A., 345 ; see 360 & 363.

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but that the title is extinct in favor of the possessor." And in an earlier passage they say that the right to "sue for dispossession belongs to the owner of the lands encroached upon, and if he suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favor of the party in possession." It also appears to me to be an accepted doctrine in our Courts that, if a party who has been twelve years out of possession, and whose suit is therefore barred, should again get into possession he is not (to use an English phrase) remitted to his old title; our Courts adopting, as pointed out by Sir Lawrence Peel in *Sibchunder Doss v. Sibtissen Bonnerjee* (1), the English rule that there is no remitter to a right for which the party had no remedy by action at all. This decision was quoted and approved of by Loch and Mitter, JJ., in *Raja Baradakant Roy Bahadur v. Prankrishna Paroi* (2), and the principle here laid down has been applied exactly in the same way to the English statute of limitations (see *Brassington v. Llewellyn* (3).) I may add that the decision in *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs* (4) was given upon the law of limitation as it existed prior to 1859, but the principle of that decision has been frequently applied to Act XIV of 1859, which governs the present case.

The question, therefore comes to this:—Had the defendant allowed his right to be barred by the law of limitation? It seems to me that he had. His cause of action arose when his purchase was completed in the year 1856. His right (as he himself admits) to possession was then denied by Dad Ally, and subsequently by Dai Ally's heirs. Nevertheless, he did not commence any suit to recover possession till the year 1867; and the persons whom he then sued, the heirs of Dad Ally, had then parted with their interest in, as well as their possession of, this portion of the property, and (if it has any bearing on this point) the lower Appellate Court finds that the defendants must have known when that suit was brought that the plaintiff was in possession of this Property. I think, there-

(1) 1 Boul. Rep., 70; see 79.

(3) 27 L. J., Ex., 297.

(2) 3 B. L. R., A. C., 343.

(4) 11 Moore's L. A., 345.

fore, that this stands as a simple case in which the party out of possession has omitted to sue upon his cause of action for twelve years ; that his right is thereby barred ; and that his title is extinct. Hence it follows that, even if the plaintiff has proved no title, still the defendant has proved none either ; and that therefore under s. 230 the plaintiff ought to be restored to possession.

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But I also think (which is the plaintiff's first contention) that the plaintiff has proved his title. The Privy Council say, in the case of *Gunga Gobind Mundul v. The Collector of the 24- Pergunnahs* (1), not only that the title of the party whose right is barred by the statute of limitation is extinguished, but that it is extinguished in favor of the possessor. When the twelve years expired in this case, the plaintiff was in possession, and was he "the possessor" within the meaning of this rule ? I understand it to be admitted by the Advocate-General, and I think it cannot be disputed, that by the possessor is here meant not only the person in original possession, but any person who comes in under him during the twelve years by inheritance, will, or conveyance. But if this be so, I do not see how the plaintiff can be excluded. I understand the principle of law to be that a person in possession without title has an interest in the property good as against all the world except the true owner, which interest is capable of being dealt with, until the true owner interferes, just in the same way as if it were unimpeachable, and that it, therefore, passes by conveyance or device. Why then should it not pass by an execution-sale ? The plaintiff, as purchaser at an execution-sale, received a certificate, which is by law (s. 259 of the Code of Civil Procedure) "a valid transfer of the right, title, and interest of the judgment-debtors in the property sold." Dad Ally was the judgment-debtor and died in possession. His interest in the property, though without title, was of such a nature as would pass by inheritance to his sons—*Doe d. Carter v. Bardnard* (2). It did so pass ; and afterwards passed by the execution-proceedings from his sons to the plaintiff just as

(1) 11 Moore's L. A., 345. (2) 13 Q. B., 945 ; S. C., 18 L. J., Q. B., 306.

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completely as by a private sale. As against all the world except the defendant that execution-sale passed to the plaintiff an unimpeachable title, and as soon as the defendant's suit was barred, the plaintiff's title was complete.

The conclusion that the plaintiff's title is necessarily established if the defendant's title is barred, seems to me warranted by good sense as well as law. It seems to me to be almost an absurdity that there should be any case of land without an owner when there is a person in possession of it who cannot lawfully be disturbed.

I base this decision on the assumption which is warranted by the judgment of the lower Appellate Court that the plaintiff acted in good faith in purchasing this property. Had the plaintiff obtained possession of the property by fraud or violence, it may be that the case would have to be considered under a somewhat different aspect.

The decisions of both the lower Courts will be reversed, the decree dismissing the suit will be set aside, and the plaintiff will have a decree for possession with costs in this Court and the Courts below.

BIRCH, J.—The plaintiff derives his title under a purchase at an execution-sale; the defendant claims the property under a prior conveyance from the Official Assignee as representative of Dad Ally, the original proprietor. No distinction can be made between a person claiming under an execution-sale as contradistinguished from a person claiming under an ordinary conveyance—*Raja Enayel Hossein v. Giridhari Lal* (1). The defendant purchased on the 3rd December 1856. The plaintiff purchased in 1864. The defendant could not get possession from Dad Ally or his heirs. The plaintiff succeeded in obtaining possession in 1864 without intervention of the Court. In 1867, nearly eleven years after his purchase, the defendant brought a suit against Dad Ally's heirs for confirmation of his title and possession, but he did not make the present plaintiff, though then in possession, a party to the suit. The defendant obtained a decree, and in execution thereof dispossessed the

(1) 2 B. L. R., P. C., 75.

plaintiff on the 16th June 1870. The plaintiff comes into Court under s. 230, alleging that his possession was rightful, and that he was no party to the decree under which the defendant has taken possession of his property. Under s. 230 the applicant is not bound to do more than prove that he was really and *bonà fide* in possession; he is not bound to start his case by proving his title. The matter in dispute is the right of the decree-holder to dispossess the applicant, and the decree-holder is at liberty to give evidence of his title, and prove that the property really belongs to him. Unless the decree-holder can show a better title than the applicant, the latter ought to be restored to possession. Both the Courts have found that the plaintiff is an innocent purchaser free from all imputation of collusion with the judgment-debtors, and that he has been in possession of the property since 1864. Under cover of the decree obtained against the heirs of Dad Ally, the defendant has succeeded in dispossessing the plaintiff. He could not have done this by any regular suit as he would have been barred by limitation. He could not dispossess the plaintiff until he had succeeded in setting aside the execution-sale and the right acquired thereby. There is no provisions in the Indian Limitation Act, XIV of 1859, analogous to that of s. 34, 3 & 4 Wm. IV, c. 27, which declares that the right and title of the party out of possession is extinguished at the end of the period of limitation prescribed by the statute. But it has been held by the Privy Council in *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs* (1), and by this Court in several rulings following on that judgment, that, if a person suffers his right to sue for title to be barred by limitation, the effect of his laches is the extinction of his title in favor of the person in possession. And I apprehend it to be now well established that, when his remedy is barred, the right and title of a claimant is extinguished and transferred to the person in possession. The dispossession of the plaintiff by the Nazir was in reality wrongful as he was no party to the suit, and had the Court ordering execution known how the matter stood, no order for dispossession could have been given under s. 223,

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(1) 11 Moore's I. A., 345.

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and it would be inequitable to hold that the plaintiff is to be damaged by a wrongful dispossession, and that he is to be put to proof of his title when, had his possession been undisturbed, it was good against all the world. The defendant's remedy, if he ever had any against the plaintiff, is barred, and his right and title in extinguished in favor of the plaintiff. I concur in thinking the plaintiff entitled to a decree. The order of the lower Court must be reversed, and the appeal decreed with costs.

Appeal allowed.

PRIVY COUNCIL.

P. C.*
1871
Dec. 9.

JOGENDRO DEB ROY KUT (DEFENDANT) v. FUNINDRO DEB ROY KUT (PLAINTIFF).

[On appeal from the High Court of Judicature at fort William in Bengal.]

Evidence—Judgments in Rem—Legitimacy.

In a case of disputed succession to a raj, A, one son of the Rajah, deceased, was put into possession under Act XIX of 1841, and a suit, brought against him on behalf of another infant son B, filed on proof of the legitimacy of A. A third son C now claimed to be entitled against A's son on the ground that A was illegitimate, or was the offspring of an inferior marriage. *Held*, the decree in the former suit was not a bar to the further prosecution of this suit, nor would it have been had the issues in the two suits been precisely the same.

Quære.—Does there exist in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like and which in the case of war might be exercised in matters of prize,) any Court capable of giving a judgment *in rem*? (1)

THE appellant was the grandson, and the respondent, the son, of Rajah Surbodeb Roy Kut, who died on the 14th January 1848, and disputes arose as to who was entitled to succeed

* *Present*.—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PERL.

(1) See the Indian Evidence Act (I of 1872), s. 41.

to the *guddee*, and the appellant's father, Mokurund, was put in possession under Act XIX of 1841. Thereupon a suit was instituted on behalf of an infant younger son of the Rajah by another wife, Rajendro Deb, the plaintiff alleging that Mokurund was an illegitimate son by a slave-girl. In that suit Mokurund was finally successful, a majority of the Sudder Court on the 8th February 1853 holding that the illegitimacy of the elder son, Mokurund, not being proved, he could not be superseded by the younger son, the infant plaintiff, but they considered the legitimacy of the latter also proved (1). They did not absolutely decide what form of marriage had been performed between the Rajah and Mokurund's mother. He had stated it to be in the Brahmo form. Funindro Deb Roy was a posthumous son of Rajah Surbodeb, but his name was not mentioned in that litigation.

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Mokurund having died, left two sons, Chundersekur and the appellant. The former succeeded to the *guddee*, but, dying without a son, was in 1865 succeeded by the appellant. In the following year, Funindro being still a minor, this suit was instituted in his name to oust the appellant on the ground of the illegitimacy of his father, Mokurund, the plaintiff charging that he was not a party to the former suit, and that the facts had not been fully detailed in that suit, and the decree had been obtained by collusion. He also claimed to have a superior right to the inheritance by reason of his mother's marriage having been of a superior nature to that of Mokurund's mother. The appellant denied the legitimacy of the respondent, but raised the issue in bar of the suit that the finding of the Sudder Court was binding as having finally disposed of the question in reference to the birth of Mokurund.

The issue settled by the Judge of Rungpore was in the following words :—

“ Whether the decision of the Sudder in any way operated as a bar to the plaintiff's claim, or finally disposed of any question in reference to the birth of Mokurund Deb and others, and which had been decided in that suit, whether his, Mokurund Deb's mother was married accord-

(1) S. D. A., 1853, 159.

1871 ing to the Brahmo, or whether she was of the Dhasia class ; and whether the decree was obtained by collusion.”

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DEB ROY KUT. Another issue was raised as to the nature of the marriage, but no evidence was taken, the Judge holding that there being no collusion, the decree of the Sudder was a judgment *in rem*, giving Mokurund a title as the heir to the raj against the world.

On appeal, the High Court (Kemp and E. Jackson, JJ.) reversed that decision, on the ground that the judgment was not *in rem*, and remanded the case for trial of the other issues.

The defendant appealed to Her Majesty in Council, and the case came on for hearing *ex parte*.

Mr. Doyme and Mr. Mortimer for the appellant contended that this was properly a judgment *in rem*, relying both on the Civil and English law on the subject, Brown's Civil Law, vol. 2, 2nd edit., 363 & 396 ; Taylor on Evidence, vol. 2, 3rd edit., s. 1487 ; Starkie on evidence, vol. 1, 2nd edit., 215 ; *Duchess of Kingston's case* and notes (1) ; and *Meddowcroft v. Huguenin* (2). They also referred to *Kanya Doll v. Radhachurn* (3), *Meer Bahadoor Ali v. Mussamut Suneechuroo* (4), and Act VIII of 1859, s 2

Their LORDSHIPS gave the following judgment :—

This appeal is brought by Jogendro Deb Roy Kut, the defendant in the suit, out of which the appeal arises, against a decree of the High Court which overruled a decree of the Zillah Court, whereby a judgment in a former suit, which had been pleaded, was declared to be a bar to the farther prosecution of this suit, and directed that the cause should be remanded to the Zillah Court for trial upon the other issues raised therein. This was the only point before the High Court, and the only point which is now legitimately before their Lordships. Mr. Doyme indeed suggested that their Lordships might give certain directions concerning the further trial of the suit if it

(1) 2 Sm. L. C., 6th edit., 693.

(3) Case 158 of 1866 ; 6th April 1867.

(2) 3 Court., 403 ; 4 Moore's P. C., (4) 6 W. R., 157.

went back to be tried in the Zillah Court, but that course would be entirely contrary to the practice of this tribunal. The ground of appeal to the High Court was that the learned Judge was wrong in holding that the decision of the late Sudder Court, dated 8th February 1858, was a judgment *in rem*, and as such a bar to the present suit. The High Court's judgment is to this effect:—"The Judge holds that that judgment of the Sudder Court was a judgment *in rem*, declaring the title of the defendant, Mokurund Deb, to the disputed raj, and consequently that that judgment was a binding judgment, not only against the party in that case, but against all the world, and it follows, according to the opinion of the Judge, that that judgment was decisive against the present plaintiff, and that the present plaintiff cannot consequently succeed." They then refer to the judgment of the Full Bench in the case of *Kanya Loll v. Radhachurn* (1), in which the law was laid down that judgments of this description were not judgments *in rem*, but judgments *inter partes*. They also say:—"It is evident that the issues which were raised in the former suit are by no means identical with the issues which arise in this case. The plaintiff or his representative was in no way a party to the former judgment, and was not represented in that suit, and the decree then passed can in no way be binding upon him. The decision of the Judge must be reversed, and the case remanded to him, in order that he may try the remaining issues which arise in it." Therefore, it is perfectly clear that the question which I have stated is the only question which now presents itself for their Lordships' decision.

Their Lordships do not think it necessary to embarrass themselves with much discussion considering the nature of a judgment *in rem*, technically so called. It appears to them to be extremely doubtful whether there exists in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving what can be called technically a judg-

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ment *in rem*, but they will look to the substance of the thing, and consider whether there is any reasonable ground for the contention that the effect of a judgment *in rem* ought to be given to such a judgment as that which was pleaded in this case.

Now the circumstances of the former suit were these:—Rajah Surbodeb Roy Kut, the father of the respondent, and grandfather of the appellant, died in 1850, and there arose a contest among the members of his family, children by various wives or concubines, as to who should succeed to the raj, and, with the raj, to the possession of the property. It is admitted that the succession is impartiable, and on the death of a Rajah passes to the eldest of the sons of equal rank; and it is further alleged, though not perhaps admitted, that, according to the custom of the family, the issue of one kind of marriage is to be preferred to the issue of another kind of marriage. On Furbodeb's death, Mokurund Deb (the father of the appellant), the eldest of his sons, was put into possession by a summary award of a Court of Justice under Act XIX of 1841. Upon that, Ranees Bissessuree, one of the three surviving wives of the late Rajah, in conjunction with another person, brought a suit on behalf of her infant son Rajendro Deb, in order to have that order of the Court set aside, and to recover from Mokurund Deb the possession of the raj and the possession of the property that went with the raj. The suit necessarily involved two issues; one of them was the legitimacy of the plaintiff, who insisted that his mother had been married to the deceased Rajah under the Gundharbo form of marriage. If he succeeded in proving that he had to go a step further, and to prove that Mokurund Deb, his elder brother, was, as he alleged, illegitimate, that he was the son of a woman who had not been married to the Rajah at all, but the son of a slave-girl. The Court of first instance found in favor of the plaintiff in that suit. It went by appeal to the Sudder Court. The Judges of that Court were divided, but the majority found that the plaintiff in that suit had made out his title to be legitimate by the Gundharbo marriage; and as regards Mokurund Deb, they found that he also was legitimate, though they do not appear to have found in terms that he was the issue of a

marriage in the Brahmo form, which was what he had pleaded. They seem to have thought that, by reason of the declarations and acknowledgments of his father, he must be taken to be legitimate; and that being at least in equal rank with the plaintiff in that suit, and being the elder, he was a between those two parties entitled to succeed to the raj.

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In the present case the plaintiff comes forward and raises, no doubt, the same question that was raised in the former suit, as to the illegitimacy of Mokurund Deb, but he also raises the question of a priority of right by reason of the superior nature of the marriage between the original Rajah and his mother. The issues in the two suits, therefore, are not precisely the same. But if they had been precisely the same, their Lordships would still have been of opinion that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any decree be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit, or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit as the first suit were brought here and tried according to the law of this country, there could not be a pretence for saying that the judgment in it was anything like a judgment *in rem*, or that it could bind any but the parties to the suit. It would have been a mere suit for possession by a party claiming to have a preferable right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party.

It therefore seems to their Lordships unnecessary to consider whether an ordinary Zillah Court in India could in any case pass a decision which would have the effect contended for at the bar in this case, *viz.*, that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say that the judgment pleaded in this case in bar cannot be

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treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of India, which can be applied to it, and that they must humbly advise Her Majesty to dismiss this appeal. It is an *ex parte* appeal, and it is therefore unnecessary to say anything about costs.

Appeal dismissed.

Agent for appellant: Mr. Mortimer.

ORIGINAL CIVIL.

Before Mr. Justice Matherson.

1873
 July 10.

IN THE MATTER OF AUDHUR CHUNDRA SHAW AND OTHERS, AND IN THE
 MATTER OF ACT XI OF 1849 AS AMENDED BY BENG. ACT III OF 1873.

Mandamus—Matter concerning Revenue—License to sell Liquor—Jurisdiction of High Court—Act XI of 1849, s. 9—Beng. Act III of 1873, s. 1—21 Geo. III, c. 70, s. 8.

Under Act XI of 1849, s. 9, as amended by Beng. Act III of 1873, s. 1, whenever a license is granted for the retail sale of intoxicating liquors, the Collector is authorized to demand "such fee, tax, or duty as may from time to time be fixed with the sanction of the Board of Revenue, or a fee, tax, or duty, adjusted or regulated in such manner, and in accordance with such rules as the Board of Revenue may prescribe." The Board of Revenue having notified that liquor licenses for the year ending March 31st, 1874, would be put up to public auction, certain licensed liquor vendors moved the High Court for a *mandamus* to compel the Board of Revenue to issue rules prescribing the fee payable for licenses. *Held*, "that the matter wholly related to the revenue, and therefore by 21 Geo III, c. 70, s. 8, the High Court had no jurisdiction.

On the 30th of June, Mr. Woodroffe, on behalf of certain licensed vendors of spirituous liquors in Calcutta, obtained a rule calling on the Board of Revenue to show cause why a writ of *mandamus* should not issue commanding them to comply

with the requirements of s. 9, Act XI of 1849 (1) as amended by Beng. Act III of 1873, s. 1 (2), by prescribing rules in accordance with which the fee, tax, or duty payable in respect of licenses for the retail sale of spirituous and fermented liquors, granted under the above-mentioned Act, might be adjusted and regulated.

The rule was obtained upon affidavits which stated *inter alia* that, on the 7th June 1873, a notification, signed by "W. H. Ryland, Officiating Superintendent of Excise," was issued from the Calcutta Collectorate to the following effect:—

That licenses for the retail sale of liquors in Calcutta to the close of the year ending 31st March 1874 would be put up to auction on the 23rd, 24th, and 25th June 1873; that a complete list of all the shops for which licenses would be offered was open to general inspection at the Collectorate, and that the number of shops would, under no circumstances, be increased during the year; that the auction would be held subject to the following conditions:—(a) that the Collector did not bind himself to accept the highest bid; (b) that the settlement with the accepted auction-purchasers would be contingent on approval by the Police authorities of the proposed locality of the shop, and the character of the applicant for a license; two subsequent conditions had reference to the deposit payable by the auction-purchaser, and to its return or forfeiture in special cases. In conclusion the notification stated that the right to sell liquors

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(1) *Act XI of 1849, s. 9.*—"Whenever a license shall be granted under this Act, the Collector shall be authorized to demand, in consideration of the privilege granted, such fee, tax, or duty as may, from time to time, be fixed with the sanction of the Board of Customs, Salt, and Opium; and such fee, tax, or duty may be made payable in advance, or at such period as may be settled by the Collector."

(2) *Beng. Act III of 1873, s. 1.*—"For s. 9 of the said Act XI of 1849, the following section shall be substituted:—

"9. Whenever a license shall be granted under this Act, the Collector shall be authorized to demand, in consideration of the privilege granted, such fee, tax, or duty, as may, from time to time, be fixed with the sanction of the Board of Revenue; or a fee, tax, or duty, adjusted or regulated in such manner and in accordance with such rules as the Board of Revenue may prescribe; and such fee, tax, or duty shall be specified in the license, and shall be payable in advance, or at such periods as the said Board may direct."

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would be put up to auction at an upset price equal to the present monthly license fee, and that further information regarding the auction might be had on application at the Collectorate.

The affidavits proceeded to state that, upon application to Mr. A. Money, the member in charge of the Excise Department of the Board of Revenue in Calcutta, for a copy of the rules framed under s. 1 of Beng. Act III of 1873 to adjust or regulate the fees payable in respect of licenses under the Act, and also for a postponement of the proposed auction, the applicants were informed that no rules had been framed, but that the conditions of sale specified in the notification of the 7th June 1873 embodied the orders given to the Superintendent by the Board in accordance with the provisions of the Act, and that the auction could not be postponed.

On applying for the rule, Mr. *Woodroffe* contended that, under Beng. Act III of 1873, s. 1, the Board of Revenue were bound to make rules fixing a certain fee for licenses; that no rules whatever had been made; that the price which might be obtained at an auction was not a fee, tax, or duty; that the notification specified no uniform fee, each license was to be put up to a separate auction; and that, with the exception of the provision as to an upset price, nothing whatever was fixed finally; the notification proposed to sell in the first instance and to leave it to the purchaser to settle afterwards, as best he could, with the Police, which was in direct contravention of the provisions of the Calcutta Police Act (Beng. Act IV of 1866, ss. 36, 37) which made it a condition precedent to the obtaining a license that the applicant should first satisfy the Police authorities as to his character.

After the rule issued, a counter-affidavit was filed by Mr. T. B. Lane, Secretary to the Board of Revenue, who therein stated that the Board had prescribed rules in accordance with the Act, such rules being contained in a letter addressed to the Abkari Superintendent of Calcutta, and that the rules so prescribed were embodied in the notification of the 7th June.

The *Advocate-General*, offg. (Mr. *Paul*), and the *Standing Counsel* (Mr. *Kennedy*) shewed cause.

Mr. Woodroffe and Mr. Branson in support of the rule.

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The *Advocate-General* contended that the Court had no power to issue the *mandamus*. The High Court has the same powers only as the Supreme Court formerly possessed, except in so far as those powers have been curtailed by legislative enactment. But 21 Goe. III, c. 70, s. 8, enacted that "the Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue, or concerning any act or acts ordered or done in the collection thereof, according to the usage and parties of the country, or the Regulations of the Governor-General in Council." The mode of levying fees on licences is a matter wholly concerning the revenue and its collection. S. 36 of Act XXI of 1856 (1), which regulates the grants of licenses in the mofussil, is wider in its terms than s. 9 of Act XI of 1859, under which licences in Calcutta were granted; the latter Act was therefore amended by Beng. Act III of 1873, and the section was amended is sufficiently wide to enable the Board of Revenue to put up licenses to public competition. The Act does not require the publication of the rules in any particular way; and the affidavits upon which the rule was granted afford themselves a conclusive answer to the application, since they show that the conditions of sale contained in the notification of the 7th June embodied the orders of the Board of Revenue. Assuming rules to have been made, the High Court cannot try the question whether or not those rules are legal on the order show to cause against a *mandamus*. When a public body is vested with discretionary powers, the Court will not, by *mandamus*, interfere with the manner in which those powers are exercised—*Gasper v. The Civil Service Commissioners* (2).

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- (1) Act XXI of 1856, s. 36.— from time to time, be fixed with the sanction of the Board of Revenue; "Whenever a license for the retail sale of country spirits, teree, and puchwe, or intoxicating drugs, shall be granted under this Act, the Collector shall be authorized to demand, in consideration of the privilege granted, such a tax or duty, or a tax or duty adjusted on such principles, as may, and such tax or duty shall be specified in the license, and shall be payable at such periods as the said Board may direct. * * *
- (2) Reported in the *Times* of the 26th April and 7th May 1872.

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Mr. *Branson*, in support of the rule, advanced the same arguments as had been used by Mr. *Woodroffe* when he moved for the rule, and contended that 21 Geo. III, c. 70, s. 8, did not prevent the Court from interfering in the matter.

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MACPHERSON, J., discharged the rule with costs, observing that the matter wholly related to the revenue, and the Court therefore had no jurisdiction.

Rule discharged.

Attorney for the Board of revenue: *The Government Solicitor.*

Attorney for the licensed vendors: Mr. *Pittar*.

IN THE INSOLVENT COURT.

Before Mr. Justice Pontifex.

In re HOWARD BROTHERS, INSOLVENTS.

*Insolvent Act (11 & 12 Vict., s. 21), s. 5—Jurisdiction—Insolvent Trader—
“Reside”—Costs of Opposition.*

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July 9.

The word “reside” in s. 5 of the Insolvent Act, when applicable to the insolvency of traders, includes an occupation for the purpose of trading, whether or not accompanied by sleeping or dwelling (1).

On the hearing of the insolvents’ petition for their discharge, the following facts were proved :—The insolvents were traders : their Chief office was at Mirzapore, but they had a branch office in Calcutta, which was managed by an agent receiving a fixed salary : the name of the insolvents’ firm appeared on a signboard at the door of the Calcutta office, and their goods could be obtained on the premises ; but the accounts of the Calcutta business were kept in the Mirzapore books under the heading “Calcutta branch.” Carr, one of the insolvents, lived at Allahabad, and no member of the firm lived in Calcutta.

(1) See *In the matter of Tariney Churn Goho*, ante, App., p. 26.

Baboo *Kallynath Mitter*, on behalf of a creditor of the insolvent Carr, opposed his discharge upon the ground that, under s. 5 of the Insolvent Act, the Court had no jurisdiction, since the insolvent did not reside in Calcutta. He referred to *In re Tietkins* (1), *In re Cockburn* (2), and *In re Gartner* (3). He stated that, in the last mentioned case, the insolvent carried on business in Calcutta, but dwelt outside of Calcutta, and that Norman, J., had accordingly dismissed the petition, holding that this Court had no jurisdiction. He also asked for costs of the opposition.

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Mr. *Lowe* for the insolvents was not called upon.

PONTIFEX, J.—I consider that the word “reside” in s. 5 of the Insolvent Act, when applicable to the insolvency of traders, includes and occupation for the purpose of trading, whether or not accompanied by sleeping or dwelling. It is said that Norman, J., held otherwise; but if the case before that learned Judge related to a trading insolvency, I feel compelled to differ from him. I think that in this case the insolvents are entitled to their discharge.

With regard to the application for costs, I am of opinion that there must be a substantially successful opposition, or that some material benefit must accrue to the estate therefrom before costs can be allowed. Neither of these conditions has been satisfied in the present instance; I therefore refuse costs.

Discharge granted.

Attorney for the insolvents: Mr. *Carruthers*.

Attorney for the Official Assignee: Mr. *Dignam*.

(1) 1 B. L. R., O. C., 84.

(2) 2 I. J., N. S., 326.

(3) The case which was decided on the 13th of June 1868 is not reported; but the dismissal of the petition for want of jurisdiction is mentioned in *Winter v. Gartner* (a). From the advertisement of sale of the insolvents' effects contained in that report, it appears that the insolvent was a trader, but there is nothing to show where the trade was carried on. A note of the case in the books of the Official Assignee is equally silent on this point, but states that the insolvent lived outside of Calcutta.—Reporter's note.

(a) 1 B. L. R., O. C., 80.

APPELLATE CIVIL.

1873
March 18.

Before Mr. Justice Jackson and Mr. Justice Mitter.

**KALKE COOMAR CHATTERJEE (DEFENDANT) v. SIDDHESUR
MUNDUL (PLAINTIFF).***

Nazir, Liability of—Attachment of Property in Execution of Decree—Failure to return Property attached on satisfaction of the Decree—Beng. Act V of 1863, ss. 4 & 8.

In a suit brought against the plaintiff in the Collector's Court for arrears of rent, a decree was obtained, and a warrant was issued for the attachment of certain moveable property belonging to the plaintiff. The warrant was addressed to the Nazir of the Collector's Court, and was by him delivered to one of the registered peons of the Court for execution. The peon reported to the Nazir that he had attached the property in question, and had placed it in charge of certain persons whose receipt for it he produced and filed. Subsequently the plaintiff paid the amount of the decree into Court, and an order was made releasing his property from the attachment. A peon was sent to restore the property to the plaintiff, but the persons in whose charge it was said to have been left, alleged that they had never taken possession of the property, and the peon was unable to restore the property to the plaintiff.

In a suit brought by the plaintiff against the Nazir to recover the property or its value, *held* that the Nazir was not liable, Bengal Act V of 1863 having altered the relation which formerly existed between the Nazir and the peons of the Revenue Courts, and put them in the position of paid servants of Government.

THE respondent brought this suit against the Nazir of the Collector's Court of the 24-Pergunnas, to recover the value of certain property which had been attached under the following circumstances:—A suit had been brought against the respondent by his zemindar under Act X of 1859 in the Deputy Collector's Court for arrears of rent, and a decree had been given against him. In execution of that decree, a warrant was issued by the Deputy Collector to attach certain of the respondent's moveable property: and the warrant, which was a

*Special Appeal, No. 967 of 1871, from a decree of the Judge of the 24-Pergunnas, dated the 30th May 1871, affirming a decree of the Munsifs of that district, dated the 31st August 1870.

written document, being one of the forms prescribed for adoption by the Revenue Courts, was addressed to the Nazir of the Collector's Court, the appellant, and delivered by him to one of the registered peons of the Court for execution. The peon reported to the Nazir that he had attached certain property which was specified, and placed it in the custody of certain persons, and he filed a document called a *zimmanama*, purporting to be a receipt for the property attached. After the attachment of the property, the present plaintiff paid the amount of the decree, and an order was obtained directing that the attached property should be released. A peon was accordingly despatched to restore the property to the present plaintiff: but the persons in whose charge it was said to have been placed alleged that they had never taken possession of the property, and the peon was therefore unable to restore the property as directed by the Court. Upon this the plaintiff brought the present suit against the Nazir of the Collector's Court for the value of the property attached, on the ground that the Court having taken possession of his property was responsible for the loss which had accrued to him in consequence, and was bound to restore to him the property or its value.

The lower Courts both held that the Nazir was liable for the full amount claimed. The Judge found that the decree-holder, acting in collusion with the peon, had, under color of the attachment, forcibly taken away the plaintiff's property; that no personal misconduct attached to the Nazir himself in the matter; but that as the warrant of attachment was addressed to him, he must be held responsible for the misconduct of the attaching peon, who was his subordinate. The material points of the Judge's decision which are referred to in the judgment of the High Court were as follows:—

"It is true that the responsibility of the Nazir is not declared in s. 99, Act X of 18 9, in the same express terms which are used in s. 233, Act VIII of 1859, but it appears to me that such an express declaration was not requisite in either case. An action assuredly would not lie against the Nazir for the act of attachment, or for any other act done in execution of the order of the Court, but it does lie here because he does not execute the order of the Court for the restoration

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of the property, and because his inability to restore the property arises from his own negligence and want of due care of the property of which he assumed the custody. The officer executing the writ is the Nazir and not the *piada*, who is a mere subordinate of the Nazir, an agent whom he is empowered to employ, but not an agent on whom he is empowered to devolve his own liabilities. The appellant contends that under the terms of s. 4, Beng. Act V of 1863, the *piada* is the only officer who can be employed in the service or execution of the process of the Court; but he selects his own *piadas*; and it does not follow that he is relieved from his responsibility by his employment of the authorized services of the persons whom he appoints with the sanction of the Court.

"It is urged that there is this difference between the Nazir, and the Sheriff of an English Country, that the Nazir cannot appoint his *piadas*, without the approval of the Court, whereas the appointment of the bailiffs lies in the hands of the Sheriff alone: but I cannot see that this practice, if it be truly stated, affects in any degree the responsibility of either. The writ as the Munsif shows, is directed to the Nazir, and he is bound to see that it is properly executed, either by himself or by his *piadas*; and if loss arises from his want of due care, either personally or through his subordinates, he is responsible for it.

The Judge accordingly condemned the Nazir to pay to the plaintiff the full value of the property attached. From this decision a special appeal was preferred to the High Court.

The Legal Remembrancer (Mr. Bell) and Baboos *Unmodaprosad Banerjee* and *Jygodanund Mookerjee* for the appellant.

Mr. J. S. Rochfort and Baboo *Mutty Lall Mookerjee* for the respondent.

The Legal Remembrancer, for the appellant, contended that the plaint disclosed no cause of action against the Nazir. No personal misconduct was attributed to the Nazir: the utmost that was alleged against him was that he had been guilty of constructive negligence through the misconduct of the peon, who was his subordinate. The judgment of the lower Court was based upon a fancied analogy between the Sheriff of an English county and the Nazir of a mofussil Court. But in reality there is no

sort of resemblance between the two—*Okhoy Chunder Dutt v. Briskins* (1). [JACKSON, J.—There is no necessity to go into that point, there is clearly no resemblance between the two.] The action of the Nazir from first to last was perfectly regular. The warrant of attachment was issued under s. 98 of Act X of 1859 : and was addressed to the Nazir in the form given in the Schedule of the Act. S. 146 provides that all processes issued by a Collector shall be served “by the Nazir or such other officer as the Collector may direct.” Now the word Nazir is defined in s. 168 to be “any officer of a Court authorized to serve or execute its process.” The person who served the process in the present case was a peon registered under Beng. Act V of 1863. S. 4 of that Act provides that “no person who is not a registered peon shall be employed in the service of the process of any Court without the special leave of such Court.” And s. 8 directs the Nazir to endorse the serving-peon’s name on the back of the process. The name of the peon was duly endorsed on the back of the process, and it is difficult to see what more the Nazir could have done. These registered peons are not agents or servants of the Nazir : they are the servants of the Court. The Nazir is in no way responsible for their conduct. The Court can dismiss them : and the Nazir must employ them. The maxim of *respondent superior* does not apply to persons standing in such a relation. The Nazir derived no pecuniary advantage from the service of the writ of execution. He was merely acting as a public officer—*Hall v. Smith* (2). It is well established that one officer in a public department is not responsible for a subordinate in the same department, though he may appoint the Subordinate—*Whitfield v. Lord Le Despencer* (3), *Nicholson v. Mounsey* (4) and *Mersey Dock Trustees v. Gibbs* (5). The parties on whom the liability really falls ought to have been made defendants in the Munsif’s Court.

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Mr. *Rockfort* for the respondent.—The Nazir is liable in this case, he being responsible for the acts of his subordinates. He was primarily bound to execute the writ himself. If he chose

(1) 3 W. R., Mis., 11 ; see 14.

(4) 15 East., 385.

(2) 3 Bing., 156 ; see 160.

(5) Lr R., L. H., L. C., 93 ; see 124.

(3) 2 Cowper, 754.

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to execute it through a peon, he must take the responsibility of doing so. A peon employed by the Nazir does not come under the words of s. 99, Act X of 1859, as an "officer executing the writ;" see s. 144, which provides that "every process shall be served or executed by the Nazir, or by such other officer as the Collector may direct." Here the Collector did not direct any one else to execute the writ. That peons are not officers is also shown by s. 133 where the words are "officers holding sales under this act, and all persons employed by or subordinate to such officers" by which is meant "peons." Where a thing is intended to be done by a peon, it is so stated; see s. 124. Under s. 99 the Nazir is to approve of a fit person to take charge of the goods attached. Here he clearly did not select a fit person. He attached the property through the peon, and the peon those the custodians. The peons appointed by the Nazir under s. 3, Beng. Act V of 1863, are the Nazir's agents. He has power to dismiss them; see Regulation V of 1804, ss. 12 and 13, and Regulation VIII of 1809, s. 10. The relation between the Nazir and his peons is analogous to that between a Sheriff and his bailiffs; see Broom on the Superior Courts, p. 591. By s. 8, Beng. Act V of 1863, and ss. 12 and 13 of Regulation V of 1804, the Nazir is liable for the acts of the peons. Their appointment was subject to the responsibility prescribed by s. 2, Regulation XIII of 1793. That Regulation has been repealed since the decision in this suit by Act XXIX of 1871. By that section the Nazirs were to enter into a penal obligation for the good behaviour of the peons whom they appointed. A decree holder is not responsible for, or liable to be injured by, the act of a Court in assisting him to execute his decree—*Rajbullub Gope v. Issanchunder Hujrah* (1) and *Joykallee Dossee v. The Representatives of Chand Mala* (2). The arguments of the other side drawn from expediency might be reasons for changing the law, but not for defeating the remedies to which it is submitted the plaintiff is entitled. The Nazir ought to have enquired as to the disposal of the property attached. The Court has no power to add parties to the suit under s. 73,

(1) 7 W. R., 355.

(2) 9 W. R., 133.

Act VIII of 1859, unless they are entitled to some claim or interest in the subject of the suit, or will be affected by the result—*Joy Gobind Doss v. Gouree Proshad Shaha* (1) and *Padmalochan Sen v. Lall Ohund Gupt.* (2). Here neither the custodians, nor the decree-holder, nor the Government, are likely to be affected by the result, or have any claim on the property taken.

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The *Legal Remembrancer* in reply.

The judgment of the Court was delivered by

JACKSON, J. (who after stating the facts continued:)—The case comes before us in special appeal, and the principal point which we have to decide is whether, under the circumstances, there is any personal liability attaching to the Nazir. The view taken by the Zillah Judge in his decision, which is the one immediately before us, is contained in the part of the judgment which I am about to read. He says:—(reads the portion set out in the statement of the case.) The Government advocate appeared in this case, and although we could not see that the Government had any direct interest in the matter, not being a party to the suit, we gladly heard the learned gentleman, and are much indebted to him for the assistance which he has rendered to the Court in the decision of this case. It was contended amongst other things that both the Nazir and the peon who has the officer immediately employed to execute the warrant are paid servants of Government, and one servant is not responsible for the acts of the other; that the Nazir, like all Nazirs of the Civil Courts, has now no interest in the fees leviable as *tallubana* for serving processes; that there is no analogy between the office of a Nazir and that of a Sheriff of an English county as supposed by the Courts below; that the peon was a public servant; and that if a warrant in this case was addressed to the Nazir, it was so done in contravention of the terms of Beng. Act V of 1863; and accordingly it was contended that the

(1) 7 W. R., 202.

(2) 1 B. L. R., S. N. xxvi.

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writ ought to have been addressed to the peon, and that the common practice in this matter was to make over warrants of Courts, though addressed to the Nazir, to the Subordinate *piadas* for execution. Mr. Bell, I should mention at the close of his argument, proposed to point out who was the real person who ought to have been sued, and who was liable for the demand, and he contended that the Munsif ought to have made the parties who were really liable defendants in the suit. As to this contention I may observe that, when a plaintiff brings a suit against a person who is not liable to him for the particular matter for which the suit is brought, it is not for the Court to go on and find out who is the person really liable to the plaintiff; and as it was altogether foreign to the purposes of this appeal to consider who, if not the Nazir, was liable, we did not think it necessary to enter into that part of the case.

The Munsif who decided the suit in the first instance laid considerable stress upon the terms of s. 87, Act X of 1859, and the form being, I understand, the Form (E), annexed to that Act, and which is prescribed by s. 86 of that Act. S. 86 was repealed by Beng. Act VI of 1862, and instead of that we have s. 17 of Beng. Act VI, of which the last words are "process of execution against the person or moveable property of a debtor shall be in the Form (E) or the Form (F) contained in the schedule to Act X of 1859, or in a Form as nearly resembling those Forms as the circumstances of the case may admit." Now, subsequent to the passing of Act X of 1859, and before the bringing of this suit, a material change in the law regulating the machinery for executing process of Courts, including the Courts of the Collector, had taken place by the repeal of s. 14, the only then surviving part, of Regulation XXVI of 1814, and by the enactment of Beng. Act V of 1863. When Act X of 1859 was enacted, not only the Regulation of 1814, but also Regulation V of 1804, ss. 12 and 13, were in force, and by these two provisions taken together, it was provided that all orders and processes of the Civil Courts and Revenue officers were to be executed by the Nazirs of those Courts, who were permitted to appoint their own *mirdhas* and peons, and who received as their remuneration one-fourth of the *tallubana* paid in each case to the peon who

carried the several processes and orders. Under the state of things, a large portion, nearly the whole, of a Nazir's receipt, was derived from such deductions and other fees received by him, and most probably in consideration of that circumstance, the Nazir might have been held responsible for the acts of his peons resulting in wrongful damage to parties. That was entirely changed by Beng. Act V of 1863, and the peon, as well as the Nazir, became, it seems to me, a regular paid officer of Government. It was left to the discretion of the executive Government to direct that the peons should be either paid by fixed salary, or remunerated by fees, but the peculiar connection which previously existed between them and the Nazir was entirely severed. The Nazir had the nomination of them subject to the approval of the Judge (and in this case of the Collector), but he had not the power to remove them, nor had he power to employ any person other than a peon appointed under that Act in the service or execution of any process of Court, except with the special leave of the Court. I do not propose to consider here the relation between an English Sheriff and a Nazir, because I am clearly of opinion that there is no analogy whatever between the case of a Sheriff and the case of a Nazir. The Munsif observes, referring to the provisions of ss. 87 and 99, Act X of 1859 :—"These provisions show that an officer, and not a peon, is to execute such writs, that he is actually and manually to take moveables out of the judgment-debtor's possession, and deposit them in some fit place, or keep them in the custody of some fit person approved by himself." I do not quite know what in the Munsif's mind was the distinction between a peon and an officer, but if he meant to say that the Nazir is an officer, and the peon is not, and that the Nazir is actually and manually to take moveables out of the judgment-debtor's possession, and deposit them in some fit custody, I fear that, unless Nazirs are provided with some physical apparatus beyond that which is commonly given to men, it would be absolutely impossible for them to undertake such duties; and if to the performance of these manual functions is to be attached the corresponding liability in such matters, I apprehend no pecuniary inducement will be sufficient to induce a person of respectability to accept

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so burthensome an office. S. 8, Beng. Act V of 1863, provides :—
 “ On every process issued for service or execution by any peon appointed under this Act, there shall be endorsed the name of the peon deputed to serve or execute the same, the period within which the peon is required to certify service or execution, the amount payable for the service or execution of the process, and the date of payment, and such endorsement shall be signed by the Nazir or clerk of the Court.” This provision recognizes distinctly that it is the peon who serves and executes, and it is the peon from whom certificate of service or execution is to be taken, and if in addition to such certificate of service, which in my experience is always furnished by the peon, the Nazir appends some further certificate of his own, that, it seems to me, is not sufficient to entail on him any pecuniary responsibility, and does not affect the reality of the service by the peon. The Judge finds in this case that the property in respect of which the damages were claimed had been removed from the possession of the present plaintiff who was the defendant in the rent suit, but he says.—“ It is not material in this suit to find whether the *zimmadars* held it or the decree-holder ; for, if the Nazir is primarily responsible, he may settle with those who took the property ; and if the Nazir is not primarily responsible, this suit must fail, because he has been made the sole defendant.” It appears to me that it was highly material to find whether the *zimmadars* or the decree-holder held the property, because the law does not, so far as I know it, authorize the making over of the property attached to the decree-holder’s custody, but it does in s. 99 expressly authorize the property being left in the custody of some fit person, meaning thereby, I suppose, some independent and respectable person. The Judge states that “ an action lies here because the Nazir does not execute the order of the Court for the restoration of the property.” In the present case it seems that the order of attachment was executed by one peon, and the order for restoration of the property entrusted to another, I confess I am unable to see how the Nazir, under the circumstances, failed to execute the order of the Court for the restoration of the property. Then it is said that the “ inability

of the Nazir to restore the property arises from his own negligence." It appears to me that there was no negligence on the part of the Nazir. He entrusted the *parwanna* to a peon who was appointed with the sanction of the Court expressly for the purpose of such duties; and the return of the peon with the Nazir's certificate upon it was submitted in due course to the officer presiding in the Collector's Court, and was presumably approved by him.

I have already said that, in my opinion, the officer executing the writ was not the Nazir, that the *piada* was not a mere subordinate of the Nazir, and an agent whom he had power to employ, but a person who, although in a subordinate capacity, was as much an officer of the Collector's Court as the Nazir himself. In this view of the case, it appears to me that the Nazir is not directly liable, as held by the Courts below, to indemnify the plaintiff, and it is not our function to settle here who is the person, if any, liable.—

I am reminded that there is no specific allegation of misconduct against the Nazir in this case, but only a charge of implied neglect. The question therefore turns upon the general liability of the Nazir.

The judgment of the lower Courts are set aside, and the plaintiff's suit is dismissed with all costs.

Appeal allowed.

PRIVY COUNCIL.

BABOO BISSESSURNATH AND OTHERS (PLAINTIFFS) v. MAHARAJAH MOHESSUR BUX SING BAHADOOR AND OTHERS (DEPENDANTS).

P. C. *
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May 22, 23.
24, 25.

[On appeal from the High Court of Judicature at Fort William in Bengal.]
Boundary—Riparian Proprietors—Custom—Proof—Reg. XI of 1825, s. 2.

The plaintiff sued to obtain possession of land on the ground of the existence of a custom in the district that where land which had once been alluvial lies between two branches of a river (or two rivers), and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermediate land belongs to the land-owner on the side of the

* *Present*.—THE RIGHT HON'BLE SIR J. W. COLEVILLE, SIR MONTAGUE E. SMITH, SIR ROBERT COLLIER, AND SIR LAWRENCE PEARL.

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channel which at any given time is fordable. *Held* (without deciding whether such a custom falls within s. 2, Reg XI of 1825) no clear and definite usage had been established.

A fluctuating boundary between zillahs does not necessarily affect the rights of landed riparian proprietors.

An *ikrarnamah* between two zemindars as to the mode of determining the boundaries of their estates in the event of changes in the channel of a river, cannot bind persons claiming under one with whom the perpetual settlement was subsequently made as to the lands in his possession, he being a stranger to that *ikrarnamah*.

This was a dispute between the appellants claiming by a conveyance from the zemindars of Manjhee, the first of whom was Mahomed Togh Ali, and the respondents, the zemindars of Arrah Naukars of the Raj of Doomraon.

The rivers, Ganges and Dewa, which separate Zillahs Sarun and Shahabad, have from time to time been liable, during the rains, to frequent changes of channel, and have caused very extensive diluviation of the low lands, which form a delta of considerable area near the point of their junction. In the past century the ancestor of the respondents, Maharajah Bidkramageet, Rajah of Doomraon, was one of the proprietors on the Shahabad side, and in or about the year 1766 sold the alluvial lands, which afterwards came to be called Talook Shitabdeara, and were comprised in the lands now in suit, to one Noorool Hossein Khan, with whom the decennial settlement of the talook of Shitabdeara, then consisting of 39 mauzas, and nearly 18,000 bigas was effected as proprietors on the 12th Decemser 1791. Further disputes arose as to accretions caused by the Dewa, between Mahomed Togh Ali and the proprietors of Arrah, other than the Rajahs of Doomraon, which were decided in 1776 in favor of Mahomed Togh Ali, on the ground of his previous possession. In the year 1771 the main stream of the river Ganges (which had flowed for some years previously along the northern channel) shifted its course, and then began to flow along the southern, and so left the northern channel dry, or fordable. Mahomed Togh Ali thereupon presented a petition to the revenue authorities claiming a right to the possession and enjoyment of the alluvial lands forming the talook Shitabdeara, which had by this shifting of the main stream become separated by it from the zemindari Arrah, and attached to his zemindari

Manjhee, insisting that the same had always belonged to the proprietor of that zemindari, between which and the alluvial lands the river was fordable. By an order of the Provincial Council made on that petition, the talook Shitabdeara was (and, as the appellants contended, in accordance with the said custom or usage) awarded to Mahomed Togh Ali as zemindar of Manjhee. In 1776-77 the main stream of the Ganges again shifted and returned to its northern channel from the southern, and, thereupon the then zemindar of Pergunna Arrah, in his turn presented a petition to the Provincial Council, claiming the talook Shitabdeara as it appeared "upon the same plea on which it had been awarded in 1179 Fusli (1771) to the zemindars of Manjhee,"—that is to say, on the ground of the local custom or usage. An Ameen was thereupon sent to the locality to make a personal investigation, and he made a report to the effect that the river Ganges was the fixed boundary between the said zillahs; but, nevertheless, the Provincial Council continued the possession of the zemindar of Pergunna Manjhee, on the ground solely of an alleged convenience to the Government revenue authorities, as awarding otherwise (the said Council said) would have caused an alteration in the settlement of the two zillahs of Sarun and Shahabad. It appeared that in the year 1778-79 the southern channel was found to be so dry that the ryots of Pergunna Arrah began to cultivate the channel; they also, it appeared, encroached on the mehal itself, so that when the harvest was ripe, a dispute arose between the zemindar of Arrah and the zemindar of Pergunna Manjhee as to the right to the produce. The Collectors of the zillahs respectively endeavoured, unsuccessfully, to settle this dispute, and it was at length determined by the Provincial Council at Patna that the matter should be referred to the Governor-General and Council in the revenue department for final decision. An official report, dated the 9th December 1779, was accordingly drawn up and forwarded to the Governor-General, which proceeded as follows:—

"Where the claim of the zemindar of Arrah to be decided according to ancient possession or by the laws of the shaster on the subject of boundaries, as translated by Mr. Halhed, he will not only be

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BABOO	of the river, but to a large tract to the north of it now possessed by
BISSESSUR	Berriar Sing; but he does not found his demand upon either of these
NATH	principles, and only claims the benefit of the law by which he was
v.	formerly dispossessed, and which the Manjhee zemindar then urged
MAHARAJAH	to be the invariable rule in such cases.
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"We think it necessary to acquaint you that this mode of decision has been constantly observed in all similar disputes in this province; it was followed in a contest between us and Raja Oheet Sing relative to an island thrown up by the river between the districts of Ghazee-pore and Shahabad, and in like manner in settling the claim to a *diara* (alluvial land) between the renters of Malky and Ghyaspore. We would not wish to call in question the reasons publicly assigned by our predecessors for deviating from a rule so plain and simple in itself as to preclude every possibility of error, but we cannot help thinking that however well it might be calculated to prevent any immediate confusion in the collections, it bore very hard on the zemindar of Arrah, since it was to all intents and purposes refusing him the benefit of the same law now in his favor by which he was before judged. We have repeatedly urged upon the Collector of Sirkar Sarun that the zemindars of his district can at any rate have no title to more land than they possessed by the decree of 1179 (1771), and that gent leman has as often assured us that they claimed no more, but then he urges that the boundaries were defined and fixed by the subsequent decree of 1184 (1776); but we must observe that this second decree was, in a great measure, founded on the principles of the first, for it was passed on the report of an ameen that the channel of the river excepted, which was become fordable, the land was in every other respect in the same state as in 1179 (1771) and had acquired no addition. Now, as we do not call in question the truth of the ameen's report, it will appear that no more land was decreed to the zemindars of Sarun by the order of 1184 (1776) than what they were left in possession of in 1179 (1771) Fusli, which, as has already been observed, was only 2,000 bigas capable of cultivation; if therefore they hold more, they are not authorized to do it by either of these decrees.

"The Collector of Sirkar Sarun proposed a measurement of both per-gunnas, that the quantity of land contained in each might be compared with the old *rakhabandi* accounts deposited in the *amanat* office, but we objected to this mode of decision, as it would be both expensive, tedious, and ineffectual.

"As the main stream of the Ganges has ever been considered as the boundary in similar disputes in this province, we beg leave to recommend that it may be declared so in the present and all future cases as a rule that will effectually prevent further contention."

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On the 5th May 1780, the Secretary to Government sent the following letter to the Provincial Council :—

"We have received your letter of the 9th December 1779, on the subject of a dispute between the zemindar of Arrah under your division, and the zemindar of Manjhee under Sirkar Sarun, concerning their right to an island situated in the Ganges which divides the two zemindaries.

"We have ordered Mr. Græme, the Collector of Sirkar Sarun, to meet a person deputed from you on the spot, who are to examine and determine on which side the Ganges is fordable; and on whichever side it shall be fordable, we direct that the right be decided to be in the zemindar whose zemindari lies on that side of the river."

On receipt of this letter, Mr. Leslie, the Secretary of the Provincial Council, was deputed to meet Mr. Græme at the locality, and on their arrival they found and reported that the river Ganges was flowing along the northern channel, and that the southern channel was dry and fordable. The following formal decision was given on the 31st May 1780 :—

"Particulars of the decision of the *diara* of Pergunna Arrah, Sirkar Shahabad, and of Pergunna Manjhee, Sirkar Sarun in Soba Behar, are as follows :—Between Rajah Bickramageet Sing, zemindar of Sirkar Shahabad, and Mahomed Togh Ali and Berriar Sing, zemindars of Pergunna Manjhee, Sirkar Sarun, in the suit in respect of the accretions formed by the river Ganges, a dispute was pending. To investigate into this matter, Mr. Mathew Leslie from the Council of Azeemabad, and Mr. Charles Græme from Sirkar Sarun, zilladar of the said Sirkar arrived on the disputed *diara*, and after hearing the pleadings of both the zemindars, ascertained the state of the *diara* lands and the map of the Ganges, but as it appeared to them difficult to decide the matter in dispute, therefore the gentlemen of the Council of Azeemabad and Mr. Græme forwarded a report regarding the river Ganges to the gentlemen of the Council at Calcutta. The Council of Calcutta made an order to this effect that, on whichever side the river Ganges may be fordable, the accretions formed shall belong to the zemindar of that side.

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"On receipt of such an order from Calcutta, Mr. Mathew Leslie of the Council of Azeemabad, and Mr Charles Græme of Chupra, Sirkar Sarun, again arrived at the disputed *diara*, and found that the river Ganges on the side of Pergunna Manjhee, Sirkar Sarun, was flowing, and was of great depth, and that on the side of Pergunna Arrah, Sirkar Shahabad, it was dry and fordable. Therefore, according to the orders of the gentlemen of the Council of Calcutta, it was ordered and decided the Rajah Bickramageet Sing, zemindar of Pergunna Arrah, Sirkar Shahabad, do hold possession of the *diara* formed by the river Ganges, with all the crops thereon, from the year 1187 (1779)."

The Arrah Rajah thereupon immediately took possession of the talook Shitabdeara and the produce thereon.

Subsequently, at the instance of the Government officers, an agreement was come to between the parties in the following terms:—

"I, Rajah Bickramageet Sing, and the zemindar of Sirkar Shahabad in the province of Behar. Whereas between myself, the declarant, and Mahomed Tegh Ali and Berriar Sing, zemindars of Pergunna Manjhee, in Sirkar Sarun, in respect of the suit regarding the *diara* lands of the villages of Pergunna Arrah, Sirkar Shahabad, and Pergunna Manjhee, a dispute was pending, accordingly, to investigate into this matter, Mr. Mathew Leslie, from the Council of Azeemabad, and Mr. Græme, zillahdar of Sirkar Sarun, arrived on the land in dispute, and took the statements of both parties, and inspected the map of the *diara* lands. As the case was not disposed of here, the gentleman of the Council of Azeemabad and Mr. Græme forwarded to the Council at Calcutta a report of the dispute between the parties, and a map of the *diara* lands and of the river Ganges. Thereupon orders were received from the Council at Calcutta, that on which ever side the Ganges be fordable, the *diara* lands will appertain to that side. According to this order, Mr. Mathew Leslie, of the Council from Azeemabad, and Mr. Græme, zillahdar of Sarun, again came to the *diara* (accreted) lands aforesaid, and finding that the river Ganges on the side of Pergunna Arrah, Sirkar Shahabad, had dried up and was fordable, and on the side of Pergunna Manjhee it was a flowing current with deep water, gave possession to me, the declarant, from 1187 Fusli of the *diara* lands aforesaid, with all the crops thereon. I accordingly took possession of the *diara* lands aforesaid, with all the crops thereon, and converted the produce to my use. Therefore I declare

and give this writing, that the boundary of the *diara* between Pergunna Arrah, Sirkar Shahabad, and Pergunna Manjhee, Sirkar Sarun, has been fixed in this manner, that, if the river Ganges becomes fordable on the side of Pergunna Arrah, the *diara* (accreted) lands will belong to the zemindars of Arrah; and if it becomes fordable on the side of Pergunna Manjhee, Sirkar Sarun, they will belong to Pergunna Manjhee. If any or either of us act contrary to this agreement, our act shall be false and void, and we will be liable to punishment by the Government. I therefore write and execute these few words by way of agreement that it may come of use in time of need. The 13th Jaishta, 1187 Fusli (4th June 1780)."

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In 1802 Rajah Bickramageet brought a suit against the heirs of Mahomed Tegh Ali in respect of certain other lands in the vicinity of, but lying a little beyond and to the east of, the lands of the talook Shitabdeara. In the plaint in that suit the Rajah Bickramageet Sing prayed that the lands then in question might be decreed to him in accordance with the said ancient custom, and also on the 'ground that the deep current of the river Ganges had been from a very ancient time, anterior to the British administration, the separating boundary between the said two zillahs of Shahabad and Sarun. That suit was, however, dismissed by the Zillah Judge in June 1803. The Rajah appealed against that decree, and the decision of the Provincial Council and the ikrarnama were filed in that appeal, but it being held by the Appellate Court that those documents only applied to the lands within the talook Shitabdeara, the appeal was dismissed, and the decree affirmed.

This talook was held by Noorool Hossein during his life, and on his death was divided among his heirs and descendants. By various sales in execution of decrees obtained against members of that family, and also by private purchase, the whole of the talook Shitabdeara, which had been registered in the name of Noorool Hossein, came to the possession of the Maharajah of Doomraon, the predecessor of the respondents, between the years 1836 and 1841, and was finally transferred in the Collector's books into the name of the Maharajah, on the 10th of July 1846. Besides the talook, which so stood in the name of Noorool Hossein, there was a further portion of Shitabdeara called

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Shitabdeara Nankar, or service lands, containing 1 mauza and 1,001 bigas, which had been resumed and held directly by the Government, and was afterwards settled in 1825 with the descendants of Noorool Hossein, and the Government revenue in respect of it having been by them allowed to fall into arrear this portion was sold by the Collector, and purchased by the Maharajah of Doomraon on the 29th June 1846. From the time of the sale to Noorool Hossein until its reacquisition as above stated, the Maharajah of Doomraon had no interest whatever in Shitabdeara.

In 1772, disputes as to alluvial lands were going on between Mahomed Tegh Ali, zemindar of Manjhee, and predecessor in estate of the appellants, and Noorool Hossein as a proprietor on the Arrah side, which were decided in favor of the former.

In 1849-50 the main stream of the Ganges shifted from the northern to the southern channel, and the stream on the southern side of Shitabdeara, and which divided it from Shahabad, became unfordable. Claims were consequently made by the proprietors of Manjhee to Shitabdeara, and disputes arose in the revenue Court. The Collector of Sarun expressed his opinion that, according to the terms of the *ikrarnama*, "the river formed the boundary between the two districts, and that all accretions in future would belong to whatever district they formed on." The Collector of Shahabad considered he had no jurisdiction over Shitabdeara, so far as the public question of boundaries was concerned, and referred the question of private right to a civil suit.

The plaintiffs thereupon claiming by conveyance from the representatives of Mahomed Tegh Ali, the former proprietor of Manjhee, in 1856 instituted the present suit in the Civil Court of Sarun to recover the lands now known as Shitabdeara, alleging the same to be identical with the lands known before 1780, as Shekarpore Adiajwri, and to have been the subject of the dispute and decision and *ikrarnama* of that time. They based their claim on "the deep bed of the river Ganges being the line of demarcation between Zillahs Shahabad and Sarun, according to the *ikrarnama*," &c., and the orders of Government passed at that time, and their right, on a shift of the

river, to recover the lands of which they had been deprived in 1780.

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The respondents by their answers denied that Shitabdeara was in the possession of Rajah Bickramageet in 1780, and stated that he had sold it in 1174 (1767), and that it had been settled with the purchaser, and reacquired by the Rajahs of Doomraon, that the *ikrarnama* had no reference to it, and that the villages named in the plaint had been long utterly diluviated, and so passed out of the plaintiffs' possession, and were not identical with Shitabdeara, and generally denied the plaintiffs' right to recover.

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The case was dismissed on a technical ground, but the Appellate Court remanded it for trial on the following issues :—

"2nd.—Are plaintiffs entitled to the possession of Mehal Shitabdeara, under the *ikrarnama* of 31st May 1780, on its being proved that the Ganges river has latterly, with reference to that mehal, shifted its main stream towards Shahabad ?

"3rd.—If the entire mehal is not as yet on this side of the river, can plaintiffs be allowed so much of the lands comprised in it as are on this side ; and in this case what course is this Court required to pursue towards the division of the estate and of the Government assessment thereon ?

"4th.—Can plaintiffs be allowed to claim the estate according to the boundaries of 1780, where those boundaries differ from the boundaries assigned to the mehal in the permanent settlement of 1800, and with reference to the boundaries of other estates, the proprietors of which have not been made defendants ?

"5th.—The river Dewna, now flowing north of the Ganges, and the Doab between the two rivers being now part of Ghazeeepore district, can the *ikrarnama*, which regards the alterations in the river boundary between Sarun and Shahabad, only affect such Doab ?

"6th.—If the plaintiffs are entitled to possession, are they also entitled to mesne profits ?

"7th.—Are the merits of this case in any way affected by the provisions of cl. 2, s. 4, Regulation XI of 1825, relied upon by the defendants, or of s. 2 of the same enactment, quoted by plaintiffs ?"

On the 27th June 1860, the Judge of Sarun gave judgment in the plaintiffs' favor, holding that the *ikrarnamah* applied to the lands in question, and that the effect of it was that the

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diara lands on the north of the main stream of the Ganges should always belong to the zemindars of Manjhee, those on the south to the zemindars of Arrah.

Cross-appeals were preferred, the defendants objecting to the whole decree, the plaintiffs to the quantity allotted to them.

On the 30th June 1863 the appeal came on for hearing before the High Court (Raikes and Levinge, JJ.), who reversed the decree and dismissed the suit.

The following is the judgment of Raikes, J. :—

"I do so entirely dissent from the reasoning and conclusions of the Judge who tried this suit below, that it is not necessary to refer to his judgment beyond stating that he decreed for the plaintiffs upon the grounds of the *ikrarnama* by the terms of which he held the Arrah zemindar bound to relinquish the lands he got in 1780, as the river now completely separated his estate from the lands he acquired under the decree of the Azeemabad Court, and his descendants were no longer entitled to hold what he had engaged to surrender,

"In considering this case, as it has been argued before us in appeal by the learned Counsel employed for the plaintiffs, I would remark that, if the Judge below was right in considering that the plaintiffs based their action upon the meaning and effect of the *ikrarnama*, the plaintiffs' case has been somewhat altered in the course of the arguments followed by his Counsel, they having maintained in this appeal that the plaintiffs' claim is based upon the existence of a certain custom or usage, by which the property in these lands in suit changes ownership, as the river Ganges happens to change its course, and attach them to or separate them from the present estate of the riparian proprietors upon each side of the river, and that the *ikrarnama*, as well as the official letters referred to, were intended to be used in the case as affording good and reliable evidence of the existence of this custom, as well as of its direct and constant application in determining the right to these lands whenever such opportunities occurred as might be expected to call this custom into effective operation. Now, supposing this to be the most favorable way in which the plaintiffs' case can be put, it follows that their claim is upon the existence of this local custom, and that by its operation they are entitled to get possession of this estate, the deviation of the river in 1860 having restored the rights of property in these lands, as they existed previous to 1780, when under the custom they became vested for a time in the Arrah proprietor.

"Now as to the existence of this custom, I think it is fully made out that, when claims were preferred to an island, a new formation in the Ganges, by rival riparian proprietors, the custom was to award possession to the proprietor on the side on which the alluvial lands were fordable; and if the question before us was for the possession of newly-formed lands, and we were asked to apply the custom to such lands, I should have no hesitation in doing so. But this is not the nature of the present suit. The land in dispute has been long in existence, was sold as a talook to a stranger before the period of the decennial settlement, was allowed to be separated from the Arrah estate when the Arrah zemindar entered into engagements for his own estate, and subsequently was admitted to a separate engagement under the rules of the perpetual settlement, and has ever since continued to be a separate estate, paying the sudder jumma assessed upon it, but wholly and entirely distinct and independent of the Arrah proprietor, though now accidentally and by private sale in his hands as a proprietor. The question therefore is whether plaintiffs, under the custom pleaded, can oust the Government proprietor, and nominally reannex the lands to the Manjhee zemindari, saddled with the Government revenue now attached to them. In order to answer this question, I have to consider the nature of the title that was conferred upon the descendants of Noorool Hossein under the rules of the perpetual settlement.

"I am not aware of any express law which defines this title, but the preamble of Regulation II of 1793 unmistakably shows what the Government on that day conceived to have been the position of the zemindars and other proprietors of land before the decennial settlement, and the nature of the rights and privileges which, as exercising the legislative authority, it conferred on the landholder by the perpetual settlement. While the preamble publishes the fact that 'the property in the soil has been declared to be vested in the landholders, and the revenue payable to Government from each estate has been fixed for ever,' it broadly asserts that 'the property in the soil was never before formally declared to be vested in the landholders, nor were they allowed to transfer such rights as they did possess or raise money upon the credit of their tenures, without the previous sanction of the Government;' that 'with respect to the public demands, upon each estate, it was liable to annual or frequent variation, at the discretion of the Government;' that 'the amount of it was fixed upon an estimate formed by the public officers of the aggregate of the rents payable by the ryots or tenants for each biga of

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land in cultivation, of which, after deducting the expenses of collection, ten-elevenths were usually considered as the right of the public, and the remainder the share of the landholder.' Under this exposition of what were considered and declared to be the rights of the Government, and the rights of the landholders before the perpetual settlement, I gather that the Government conceived itself to possess the sole right of property in the soil, while the landholder possessed only the right of sharing the rents payable by the ryots and tenants of the soil, and when the Government divested itself of the property in the soil, and gave it up to the landholders, the latter then acquired all the rights which now constitute a legal title to real property in this country. It was by this process then that the heirs of Noorool Hossein acquired the title by which they held the lands in 1797; and if any one now claims a right to possess them, the claim ought in my opinion to be founded upon the ground that the claimant possesses a better personal right than the present proprietor to hold the estate from the Government. But the plaintiffs do not say that, when the settlement was concluded with Noorool Hossein's heirs, those heirs had no right to the settlement but only that they have now the right under immemorial custom. This however, is tantamount to saying that under the custom pleaded the lands should be annexed to the Manjhee zemindari, and the settlement with Noorool Hossein's family broken up, and the identity of the lands, as forming a separate estate, obliterated.

" But here proof is altogether wanting that the custom relied upon has ever been held sufficient to break up an existing settlement, or to apply to lands which have been recognized as the component part of an estate, and protected by separate and distinct engagement entered into between the possessor and the Government. I therefore come to the conclusion that the custom acted upon by the plaintiffs has never been applied except in newly formed lands, to which no preexisting proprietary title can be made out, and that to lands which have been proved to be held under a sufficiently good legal title, such as was conferred upon Proprietors at the perpetual settlement, the custom cannot be applied. In this latter position I hold these lands to be, and to have been covered by such a title since the settlement with the proprietor in 1797.

" It is needless to say that, if the plaintiffs' predecessors in Manjhee considered these proceedings in 1797 were likely to be prejudicial to their latent rights, they should have brought the question to issue within limitation time, as [it is clear that a title adverse to their rights has been vested in the proprietors since they were admitted to settlement.

"I would therefore reverse the judgment of the Court below, and dismiss the plaintiffs' case with costs in both Courts in these cases." 1872

Levinge, J., concurred in reversing the judgment of the Zillah Judge, but he did not concur in the reasons for such reversal. The following are the material portions of his judgment :—

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"I consider the plaintiffs did establish by evidence the existence of a custom prevailing anterior to 1779 in the locality of the lands claimed in the suit, that custom being that, whenever the Ganges shifted its course by a sudden change of the channel from one old-established channel to another, the land which had been previously separated or cut off by that great navigable river became the property of the proprietor for the time being of the land to which it so became annexed by the retreat of the Ganges. This appears to me to be clear from the letter of the Provincial Council of Patna, dated the 5th May 1780, given in evidence in this suit. That the river Ganges did make these sudden alterations in its course out of one old channel into another will appear from the statements contained in that letter, the proof afforded by the maps given in evidence by both parties during the hearing of this appeal, and the fact admitted that very recently the Ganges has left the channel in which it has hitherto for many years been running, and has again reverted to its other channel. In consequence of the changes of the river, certain lands clearly distinguishable became on each shift of the Ganges cut off by a wide navigable river from one proprietor and annexed to another; and it does appear to me from the evidence in this cause that a usage did exist, and was acted on by the neighbouring proprietors, giving to them a right of ownership in the land for the time being, and during the time and only so long as the same remained annexed to their estate; in short, establishing a right of shifting proprietorship in lands along the course of the Ganges, and in the locality of the lands in dispute in this suit. I am further satisfied in this view of the evidence by reference to a decision in the case of *Rajah Grieschund v. Maharajah Tezchund* (1), dated 8th May 1809, in which it will be seen that the Court acted on the evidence of a custom which established the proprietorship in land similarly circumstanced to the land in question in this suit in the person to whose property for the time being the land became attached by reason of the sudden change of the course to the river. Not only was the usage established as to other lands in that

(1) 1 Sel. Rep., 274.

1872 locality, but, in my opinion, it was established with regard to the island called Shitabdeara.

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" In my opinion all matters in dispute for the future connected with the proprietary rights in the Shitabdeara were put at rest, and finally determined by the decision of the Governor in Council on the 5th May 1780, communicated to the Council at Patna, in reply to their communication of the 9th December 1779, and that decision is in these words :—(*reads* decision of 5th May 1780) (1).

" We have clear proof of both zemindars acting on this order of the Governor-General in Council, for the plaintiffs in this action give in evidence the *ikarnama* already mentioned, executed by both zemindars, reciting the previous disputes and the above order of the Government, and this document states that the lands were awarded to the proprietor of Arrah, together with the produce from 1187 (1779). I consider the *ikarnama* was a document entered into by these proprietors for the purpose of settling any future disputes concerning new alluvial formations, and not with regard to the Shitabdeara, and as providing a guarantee that in case of any disputes concerning these new formations, the proprietorship should be settled according to the spirit of the then existing custom, and such alluvial formation should become the property of the person to whose estate the newly formed land became attached.

" This being my view of the evidence in this suit, it becomes unnecessary to decide whether ss. 2, and 3, being the saving clauses, of Regulation XI of 1825, apply to this case. For the plaintiffs it is urged that, under the words of these sections, and by virtue of the 5th clause of s. 4, the usage they allege they have established by the evidence to have attached to the Shitabdeara is preserved and should now be enforced, whilst the defendants contend that, under the 4th section, cl. 2, in the event that has happened, *vis.*, the sudden change of the Ganges and the cutting off of the Shitabdeara from their estate, they are entitled to retain possession of these lands. I consider it unnecessary to give any opinion on this contention, for in my judgment the custom as to the lands of Shitabdeara was finally and conclusively disposed of in 1780, and that being so, the defendants are clearly entitled to retain possession.

" Taking this view of the case, I am saved the necessity of giving any opinion as to what were the rights of the Government in the soil :

(1) *Ante*, p. 269.

whether by virtue of their right as conquerors, their dominion was absolute and uncontrollable, and the occupiers but tenants at sufferance, or whether they acquired only the right to assess the lands held in proprietorship for the purpose of revenue, with the power incidental to that right of disposing of the land in the event of the non-payment of the revenue.

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"The preamble to Regulation II of 1793 only asserts that 'the property in the soil was never before formally declared to be vested in the landholders, nor were they allowed to transfer such rights as they did possess, or raise money upon the credit of their tenures, without the previous sanction of the Government.' This is a mere assertion, and is not conclusive proof of its truth; for nowhere can I find any conclusive proof that the possessors of the usufruct of the soil had no absolute proprietary rights in the soil itself, but simply enjoyed the benefits produced by the land at the sufferance of the Government. In opposition to the assertion contained in the preamble to Regulation II of 1793, I would refer to the provisions of Regulation I of 1793, s. 9, and it is clear from the words of that section that the Government did recognize distinct proprietary rights in the soil in the zemindar and other actual proprietors of land. That there did exist in the opinion of Government much doubt on this matter is manifest from perusal of Mr. Harrington's Analysis of the Regulations, Vol. III, wherein the rights of landholders are so fully discussed. This difficulty was no doubt greatly enhanced by the engagements of Government to carry out the Mahomedan law, and the difficulty of satisfactorily saying what were the precise rights of the occupiers of the soil under the Mahomedan law. However, I consider I have no occasion to give any opinion as to what were the rights and powers of the Government over the lands in dispute in this action at the time of the arrangement with the zemindars of Arrah and Manjhee in 1780, or at the time of the settlement with Noorool Hossein in 1790; but if it were necessary, I should have no hesitation in ruling that the effect of the failure of the plaintiffs to show ownership in the land by the zemindars of Arrah after 1780, and on the proof of the settlement with Noorool Hossein in 1790 by the Government, a settlement directly opposed to the custom now sought to be set up, and a continuous occupation of the Shitabdears by Noorool Hossein and his heirs, without any claim being put forward by either of the zemindars of Arrah or Manjhee, and the subsequent purchasers by the zemindar of Arrah in 1835, 1837, and 1839, clearly bars the plaintiffs from succeeding on the alleged custom.

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"I would only further add that there does not appear to be any fair pretence on the evidence in this cause for asserting that the occupation of Noorool Hossein and his heirs was merely colorable and in trust for the proprietor of Arrah."

The plaintiffs appealed to Her Majesty in Council.

Mr. *Leith*, Mr. *J. D. Bell*, and Mr. *Arrathoon* for the appellants contended that the Zillah Judge was right in holding that the agreement was to be binding in all such disputes arising between the zemindars of the two pergunnas; and that even if the actual land now in dispute was not the same as referred to in that agreement, it was quite in the same position so far as to be affected by the terms of the agreement. Besides, the local custom as to the boundary shifting with the stream was clearly established, and the Regulation XI of 1825, s. 2, was applicable. That the custom was one, not only affecting Government, but the zemindars, appeared from admissions in former suits in which the respondents' predecessors had relied on it. The law is the custom, if not, the section of the Regulation is of no effect. The custom is fully proved—*Rai Manick Chand v. Madhoram* (1). The present respondents are bound by the rule, even though claiming through Noorool Hossein—*Spencer's case* (2).

Sir *R. Palmer*. Q. C., Mr. *Field*, and Mr. *Doyne* for the respondents.—The *ikrarnama* has no application to the lands in suit. When that *ikrarnama* was made, the lands now in dispute were settled with Noorool Hossein; and although they have come back to the hands of the Rajah of Doomraon by sales, the *ikrar* cannot affect them. The attempt to set up a custom is attempting to raise a case not relied on in the pleadings, but set up at the hearing. The effect of construing the Regulation XI of 1825, s. 2, as is contended for on the other side, would be to unsettle titles and cause mortgagees to lose the security of land on which they have made advances. The respondents are in possession under a title created in 1771, or at the time of the settlement in

(1) 3 B. L. R., P. C., 5; S. C., 13 Moore's I. A., 1.

(2) 1 Sm. J. C., 45.

1790, and it is monstrous to seek, by establishing such a custom as is alleged (though what that custom is, it is difficult to make out) to oust them from the estate. But the 2nd clause of the 4th section of the Regulation XI of 1825, if that Regulation is applicable, saves the defendants.

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Mr. *Leith* in reply.—The custom is set forth in the plaint. There is no such sudden change as is contemplated by Regulation XI of 1825, s. 4, cl. 2.

Their LORDSHIPS gave the following judgment :—

This was a suit to recover possession of a large tract of land which had at one time been alluvial, but which for a great number of years had been regularly cultivated and inhabited, lying between two streams described by the plaintiffs (who are now the appellants,) as branches of the Ganges, but which might perhaps be more correctly described, the one as being the river Dewa and the other as being the river Ganges. The plaintiffs were the owners of a zemindari, of the name of Manjhee, on the north side of the north channel; the defendants were the owners of the zemindari, of the name of Arrah, on the south side of the south channel, both streams flowing from the west and joining each other to the east of the property in dispute. It appears that the tract of land between these two channels was, as early as the year 1790, in the possession of one Noorool Hossein, with whom, as occupier and proprietor, a settlement was made by the Government in the year 1790, and that in the year 1800, a permanent settlement was made with his son. The defendants claim the land in question by purchase from a descendant of Noorool Hossein, and it appears to be undisputed that Noorool Hossein and his heirs and those who succeeded him in title down to the present defendants have held uninterrupted possession of this land from 1790 to the present day. The plaintiffs seek to eject the present possessors, the defendants, upon these grounds; it appears that in the year 1849 or 1850 the great volume of water left the northern channel and took the southern channel, whereby the northern channel which before had been deep became fordable, and the southern channel which before had been fordable became deep, and they allege

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that, upon that state of facts, they are entitled to obtain possession of the whole of the land lying between these two channels, by virtue, first, of an alleged custom; secondly, of an *ikrarnama* executed in 1780 between the then proprietor of the zemindari Manjhee and the then proprietor of the zemindari Arrah.

It is necessary to examine separately these two grounds on which the plaintiffs rely. First, as to the custom. The custom on which the plaintiffs rely is nowhere to be found clearly stated in their pleadings, and their Counsel found some difficulty in quite accurately defining it. It appears to their Lordships that, in order to succeed in disturbing a possession of such long duration under the circumstances of this case, it is necessary for the plaintiffs to establish a custom existing in the district in which these properties are situated to the effect that, where land which had once been alluvial lies between two branches of a river (or, it would appear, between two rivers), and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermediate land belongs to the landowner on the side of the channel which at any given time is fordable; in short, that the ownership and right of possession of the whole intermediate tract of land shift with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happens for the time being to be fordable. It should be observed that this custom appears to be based on the hypothesis that at all times one channel is deep, and the other fordable, because it could not apply if both were deep, or both were fordable; it would also appear that this custom is wholly independent of any question of accretion or arrosion of banks; that it attaches merely upon the water becoming deeper or shallower in one channel or the other without necessarily any alteration in the beds or banks of the channels.

This being the custom which it appears to their Lordships that the plaintiffs are bound to make out in order to establish their case, their Lordships would require to be satisfied by very clear and distinct evidence of its existence, since the operation of such a custom must be to render the rights of property fluctuating and precarious.

A question has indeed been suggested, whether a custom of his description falls within the terms of Regulation XI, s. 2. Their Lordships, however, do not think it necessary to decide this question, inasmuch as they have come to the conclusion that no "clear and definite usage" such as would be necessary to support the plaintiffs' case has been in point of fact established by the plaintiffs. Reference has been made very frequently in the record, and in the course of the argument, to certain proceedings on the part of the Government which took place in 1780, and the *ikrarnama* executed by the proprietors of the respective estates at that time in pursuance of those proceedings, but their Lordships are of opinion that the effect of those proceedings and *ikrarnama* amounts to no more than this: that there being a dispute, indeed a violent quarrel, as it would appear, between two zemindars whose properties were contiguous the one to the other, the Government adopted a settlement at the time between them which appeared to be equitable and expedient, and to be in conformity with what had been done on previous occasions by previous owners of the same properties, and that this arrangement made with these two landowners by the Government was acquiesced in, adopted, and ratified by the *ikrarnamas* which has been referred to, which it will be necessary subsequently to state more in detail. This by no means amounts to that clear proof which would be required to support a distinct custom of this description, and to sustain the claim of the plaintiff to transfer to themselves this property from those who have been in possession of it for 80 years or more. The other evidence which has been relied upon in support of the custom consists mainly of supposed admissions on the part of the defendants in the course of various legal proceedings; but upon examination those admissions do not appear to amount to more than this, that the defendants or their predecessors appear in certain proceedings to have insisted upon a rule somewhat similar to that which the plaintiffs now allege, but by no means indetical with it, as applicable to these zemindaris, and do not point to "a clear and definite usage" binding all property within the district.

Reference has been made also to various proceedings with

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respect to other properties, in which the Government authorities have treated the main channel of the Dewa as the boundary between certain zillahs; and to one case in which they appear to have intimated that that boundary should be applied also to certain private properties; but the circumstances of these cases are not so distinctly before their Lordships that they are enabled to treat them as proof of such a custom as that which has been before described, and upon which it is necessary for the plaintiffs to rely. It may be observed that it by no means follows that, if a certain fluctuating boundary, viz., the course of a river, is adopted between two zillahs, its adoption for that purpose affects the rights of landed proprietors in those zillahs. The case of *Rai Manick Ohind u. Madhoram* (1), which has been referred to, is to the effect that there may be a fluctuating boundary between zillahs, which by no means affects the rights of landed proprietors,

Their Lordships are of opinion that sufficient evidence has not been given to prove this custom, which is necessary in order to make out the plaintiffs' case. They agree, indeed, with Raikes, J., who says in his judgment;—"I think it is fully made out that, when claims were preferred to an island, a new formation in the Ganges, by rival riparian proprietors, the custom was to award possession to the proprietor on the side on which the alluvial lands were fordable; and if the question before us was for the possession of newly formed lands, and we were asked to apply the custom to such lands, I should have no hesitation in doing so;" but their Lordships also agree with what Raikes, J., further says;—"But this is not the nature of the present suit."

Their Lordships are, therefore, of opinion that the plaintiffs have failed to make out the first ground upon which they rely.

The second ground is the *ikrarnama* that was entered into between the then owner of the Pergunna Arrah, Rajah Bickramageet Sing, who is the grandfather of the defendant, and Mahomed Tegh Ali, who was then the owner of Pergunna Manjhee, under whom the plaintiffs claim title; and it is to this

(1) 3 B. L. R., P. C., 5; S C., 13 Moore's I. A., 1.

effect (1) :—The Rajah recites that there had been a suit with respect to *diara* lands of certain villages which he describes ; then that Mr. Mathew Leslie and Mr. Græme had been sent to survey the land in dispute, and taken the statements of both parties. Then he goes on to say :—"The gentlemen of the Council of Azeemabad and Mr. Græme forwarded to the Council at Calcutta a report of the dispute between the parties, and a map of the *diara* lands," which, unfortunately, is not now forthcoming. Then he recites that orders were received from the Council at Calcutta, that on whichever side the Ganges was fordable, the *diara* lands will appertain to that side ; and then that Mr. Leslie and Mr. Græme came again to the *diara* lands, "and finding that the river Ganges on the side of Pergunna Arrah, Sirkar Shahabad, had dried up and was fordable, and on the side of Pergunna Manjhee, it was a flowing current with deep water, gave possession to me the declarant, from 1187 Fasli (1779) of the *diara* lands aforesaid, with all the crops thereon ;" and that he therefore took possession. Then he says :—"Therefore I declare and give this writing that the boundary of the *diara* between Pergunna Arrah, Sirkar Shahabad, and Pergunna Manjhee, Sirkar Sarun, has been fixed in this manner that, if the river Ganges becomes fordable on the side of Pergunna Arrah, the *diara* lands will belong to the zemindars of Arrah ; and if it becomes fordable on the side of Pergunna Manjhee, Sirkar Sarun, then they will belong to Pergunna Manjhee. If any or either of us act contrary to this agreement, our act shall be false and void, and we will be liable to punishment by the Government." A duplicate of this agreement was executed by Mahomed Tegh Ali, the then zemindar of Manjhee. It has been contended, on the one hand, that this agreement relates only to newly formed lands or alluvial lands which may be formed after its date ; on the other, that it distinctly refers to the lands in question, at all events in their then state, and that it is applicable to them now. But, be that as it may, assuming the meaning given to this document by the appellants to be correct, their Lordships are of opinion that, whatever may have been its effect as a contract between the two zemindars who

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(1) See *ante*, pp. 270, 271.

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executed it, it clearly cannot be binding upon the defendants, who derive their title from Neorool Hossein, who was a stranger to it. Their Lordships are of opinion that it was not in the power of the then zemindar to impress upon the land a *quasi* servitude, or to burden it with a covenant which would run with it into the hands of any possessor of it by any title.

Their Lordships are therefore of opinion that the plaintiffs fail also on the second ground of claim.

That being so, it is unnecessary to go into a question which has been raised of the identity of the lands.

For these reasons their Lordships are of opinion that the plaintiffs fail to make out their case; and they will humbly advise Her Majesty that the decree of the High Court in India be affirmed, and that this appeal be dismissed with costs.

Appeal dismissed.

Agent for appellants: Mr. Wilson.

Agents for respondents: Messrs. Burton, Yeates and Hart.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

JUDONATH SIRCAR (PLAINTIFF) v. BUSSUNT COOMAR ROY
CHOWDHRY (DEFENDANT).*

Hindu Law—Inheritance—Mother—Stridhan.

According to the Hindu law as current in Bengal, the mother succeeds to the property of her daughter bequeathed to her by her father before her marriage in preference to her husband. Such property falls within the category of *stridhan*.

ONE Hurrynarain Mitter died, leaving him surviving a widow, and an unmarried daughter, Prosonomoye Dossee, and leaving a will, whereby he gave and bequeathed the whole of his property to his said daughter, and appointed the defendant, Bussunt Coomar Roy Chowdhry and one Hurryhur Bose to be the executors thereof. After the death of her father, Prosonomoye married Judoonath Sircar. Prosonomoye died a minor

* Special Appeal, No. 1198 of 1870, from a decree of the First Subordinate Judge of the 24-Pergunnas, dated the 28th March 1870, reversing a decree of the Sudder Munsif of Alipore, dated the 1st September 1869.

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*See also
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without issue, and leaving her surviving her mother and her husband, Judoonath.

This suit was brought by Judoonath against Bussunt Coomar, the surviving executor, for the delivery of the papers and accounts belonging to the estate of the late Hurrynarain, on the ground that he was entitled thereto as the heir, under the Hindu law, of his deceased wife. The defendant set up in his written statement that there was no condition in the will of the late Hurrynarain which required him to furnish such accounts, and consequently he was not liable to do so.

The Munsif held that the plaintiff was the heir of his deceased wife; and as the defendant had taken out a certificate of administration, he was bound to deliver the papers and accounts to the plaintiff. He accordingly passed a decree in favor of the plaintiff.

On appeal, the Subordinate Judge held, citing Shamachurn Sircar's Vyavastha Darpana, p. 733, that, under the Hindu law, the heir of Prosonomoye was not her husband, but her mother. He accordingly dismissed the plaintiff's suit.

On special appeal, the High Court (Norman, C. J. (offg.), and Loch, J.) held that according to the Hindu law as current in Bengal, the husband was entitled to succeed to the property which a woman had received from her father, in preference to her brother or mother. They accordingly passed a decree in favor of the plaintiff.

The judgment of the Court delivered (26th June 1871) by Norman, C.J., was as follows:—

“This is a suit by the plaintiff, who claims as heir of his wife Prosonomoye to have inherited certain property given to her by the will of her father Hurrynarain Mitter. At the time of the death of Hurrynarain, Prosonomoye was married to the plaintiff; she died under age and without issue, leaving her mother surviving her. The first Subordinate Judge of the 24-Pergunnas, Baboo Koylas Chunder Deb, reversing the decision of the Munsif, Baboo Shamdhone Mookerjee, dismissed the plaintiff's suit. From this decision there is an appeal, and the question argued before us was whether the plaintiff as the husband, or the mother of Prosonomoye, is the preferential heir.

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The Subordinate Judge referred to the Vyavastha [Darpana of Baboo Shamachurn Sircar, p. 733, in which, in the "order of succession to a childless married woman's *stridhan* given by her parents before marriage, her fee or gratuity, or bestowed after marriage," the heirs follow each other thus :—

1. The whole brother.
2. The mother.
3. The father.
4. The husband.

The authorities in support of that position are referred to at pp. 720 and 721 of the same book.

There seems to be a considerable conflict of opinion between writers on Hindu law, whether the husband is entitled to succeed to the property of a childless woman, received from her parents after the marriage, in preference to her brother, mother, and father. The two texts out of which the dispute arises are to be found in the Dayabhaga, Ch. IV, s. 3. The first is the text of Yajnavalkya, p. 88, para. 2 :—"The separate property of a childless woman married in the form denominated *brahma*, or in any of the four unblamed forms of marriage, goes to her husband."

I may premise that the *brahma* form of marriage is that which at the present day is ordinarily in use amongst the Hindus of Bengal, and I think we ought to presume that the marriage was according to that, or one of the four other pure forms, in the absence of any suggestion to the contrary.

The passage of Yajnavalkya above referred to is found somewhat differently translated in Colebrooke's Digest, folio ed., vol. 4, v. 501, p. 309 (1). The translation there given corresponds with the interpretation put upon the text in the Dayabhaga, paras. 4 and 5, Ch. IV, s. 3, where it is said :—"It is not right to interpret the text as signifying that any property, of whatever amount, which belongs to a woman married by any of those ceremonies termed *brahma*, &c., whether received by her before or after her nuptials, devolves wholly on her husband by her demise. For the terms employed in the text signifying 'at marriages in the form denominated *brahma*, &c.,' indicate time, &c."

(1) Ed. of 1801, Vol III, ch. 9, v. 501.

"Therefore, the observation of Niswarupa, that the text relates to woman's property received at the time of the nuptials, should be respected."

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After discussing the succession to the property of a woman married in the *asura* form, the author in para. 10 writes:—"But wealth received by a woman after her marriage from the family of her father, of her mother, or of her husband, goes to her brothers [not to her husband (1)], as Yajnavalkya declares, 'that which has been given to her by her kindred, as well as her fee or gratuity, and anything bestowed after marriage, her kinsmen take, if she die without issue.' The same passage from Yajnavalkya is to be found in Colebrooke's Digest, vol. 4, v. 508 (2). After discussing the various texts, the author in para. 29 says:—"Therefore the property" (which I understand to be property such as is spoken of in paras. 10 and 13) "goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; but, on failure of all these, it devolves on the husband. Thus Katayana says:—'That which has been given to her by her kindred goes, on failure of kindred, to her husband.'" This passage is referred to in Colebrooke's Digest, folio ed., vol. 4, note to v. 511, p. 317 (3). The text of Katayana, Colebrooke's Digest, vol. 4, v. 512 (3), and the opinion of Raghunandana, may be cited in support of the view that the brother, mother, and father in preference to the husband, inherit what was given by the father or mother otherwise than at the time of the nuptials.

On the other hand, it may be observed that the text of Menu Colebrooke's Digest, vol. 4, v. 502 (4), is as follows:—

"It is ordained that the property of a woman married by the ceremonies called *brahma*, *daiva*, *arsha*, *gandharva*, *prajapatya* shall go to the husband if she die without issue." The text

(1) These words are in brackets, being merely parts of a discussion on the and are apparently an interpolation. true meaning of the text in para. 2. Against them in the note is set the not the actual opinions of the author word "Srikrishna," as if Srikrishna in of the Dayabhaga. Per NORMAN, J. dealing with the text had inserted (2) Ed. of 1801, Vol. III, ch. 9, them. If so, it would seem to show v. 508. that he treats the rule to be that stated (3) *Id.*, v. 511 note, and v. 512. in para. 2, and paras. 5, 10, and 29 to (4) *Id.*, v. 502.

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of Yajnavalkya, as pointed out by the author of the *Dayabhaga*, is equally general in its terms. In the summary of s. 3, Ch. IV, by Srikrishna, *Dayabhaga*, p. 100, it is said :—" In the case of property given by the father at any other time but the wedding, a maiden daughter succeeds in the first instance; next a son, then a daughter who has, and one who is likely to have, male issue; after them the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, and her grandson and great-grandson in the male line; next to them the barren and widowed daughters inherit together; afterwards the succession proceeds, as before described, in the case of property received at nuptials denominated *brahma* &c.," that is to say, the order of succession is husband, brother, mother, and father. The same author, Srikrishna, at p. 57 of the *Dayakrama Sangraha* (1), translated by Wynch, speaking of the property of a woman not received by her at her nuptials, says :—" In default of successors' including the barren and widowed daughters, the succession devolves in due order, by the rule of analogy, as in the case of wealth received at nuptials, viz., on the woman's husband, brother, mother, and father, if she were married according to any of the five forms denominated *brahma* and the rest; or if she were married according to any of the four styled *asura*, &c., on her mother, father, brother and husband." And again, of separate property when given to her by her father, whether at the time of the wedding, or antecedent, or subsequent to it, after enumerating the heirs down to barren and widowed daughters, he says (2) :—" The son and the rest succeed as in the case of property received at nuptials." Macnaghten in 1 Hindu Law, p. 10 (3) adopts the view taken by Srikrishna. Sir Thomas Strange in a note prints the summary of Srikrishna as containing a statement of the order of succession amongst the several heirs with whom we are concerned. Baboo Prosonno Coomar Tagore, in a "Table of Succession according to Hindu law as prevalent in Bengal," sets the heirs of a woman's *stridhan* from husband to father in the following order :—After distinguishing between *yautaka* property which a woman receives at the time of her nuptials; *pitridatta*, that which a woman receives from her parents, either after or

(1) Ch. 2, s. 4, para. 11. (2) Ch. 2, s. 5, para. 3. (3) Ed. of 1829, Ch. III.

before her marriage; *anwadhya* or *julko*, that which she receives from her parent's kindred, her husband, or from his relations after marriage, &c.; and *ayantaka*, that which she receives from her son, puts these heirs in the following order:—Husband, brother, mother, father (1). Baboo Gopal Lall Mitter informs us that, in the *Dayatatwa*, it is laid down that, as to property of a woman received from her father, the husband succeeds in preference to the mother.

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On the whole I am of opinion that we are bound by the construction put on the texts by Srikrishna, and that we must pronounce that, according to the Hindu law as current in Bengal, the husband is entitled to succeed to the property which a woman receives from her father, either before or after her marriage, in preference to her brother or mother.

The result will be that the decision of the Subordinate Judge will be reversed, and that of the first Court restored with costs in all the Courts.

The defendant applied for a review of this judgment. The High Court (Loch, J.) (2) restored the case to its original number, and it now came on for hearing.

Baboo *Gopal Lall Mitter* and *Greesh Chunder Ghose* for the appellant.

Mr. *Woodroffe* (Baboo *Opender Chunder Bose* and *Rajender Nath Bose* with him) for the respondent.

Baboo *Gopal Lall Mitter* for the appellant contended that the husband was the preferential heir, *Dayabhaga*, Ch. IV s. 3, para. 2. In the case of property received from her father or mother, the heir of a childless woman is her brother, and not her mother—*Dayabhaga*, Ch. IV, s. 3, paras. 10, 11, paras. 19, 21, 22, and 23, s. 3, Ch. IV, treat of *sulka* property only. Paras 27, 28, and 29, s. 3, Ch. IV, treat of succession to *sulka* property only. JACKSON, J.—Can we treat the property as

(1) in the text of this book, para. which escaped observation when the 15, p. 14, the brother is placed before proofs were being corrected. For the husband, and both before the mother; but this is an evident mistake, probably a mere blunder of the printer,

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(2) Norman, C.J. (offg.) died before the application came on for hearing.

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stridhan? The property was not given by the father during his lifetime, but left by will. Can we not treat it as property taken by inheritance from the father? It can be treated as *stridhan*; for although wills were unknown to the Hindus, yet the description of *stridhan* in para. 1, s. 1, Ch. IV, Dayabhaga, is comprehensive enough to include property received from a father under his will. The parties have all along admitted it to be *stridhan*, and therefore the Hindu law of *stridhan* is applicable. The question whether the mother would succeed in preference to the husband to the property given to a woman under a will was not decided in *Prosono Coomar Ghose v. Tarrucknath Sirkar* (1). The husband succeeds to wealth which has been given to a woman by her father, in preference to the mother—Dayakrama Sangraha, ch. 2, s. 5, paras. 1 and 3, and ch. 2, s. 3, paras. 14 and 15. Macnaghten adopts the same view,—1. Macnaghten's Hindu Law, Ch. III. He does not blindly follow the Dayakrama Sangraha. His work was undertaken to settle all doubtful points, Macnaghten's Hindu Law, Preliminary Remarks, p. 3; see Sir Francis Macnaghten's Considerations of Hindu Law, pp. 239 and 240, and Baboo Prosono Coomar Tagore's Table of Succession.

There is no precise text to be found in the books of Hindu law, therefore the case ought to be disposed of according to the principle of *jukti*, or reason. The husband offers the funeral cake, which the mother does not, and is of the same *gotra*, which the mother is not. This forms an important element in determining heirship; see Note of Srikrishna and Achyuta to para. 23, s. 2, Ch. IV of the Dayabhaga. The Dayabhaga is not to be followed, as no subsequent writer has accepted the doctrine. Dayatatwa, d. 43 (2), does not dispose of the point. It places

(1) 10 B. L. R., 267,
(2) Dayatatwa, p. 43, as translated by Baboo Shamaachurn Sircar, late sworn interpreter of the High Court. The translation was filed with the petition of review:—

"But failing them (*vis.*, the daughters who are barren, or sonless widows) the husband (succeeds). This however

does not relate to property given by the father or mother, because the brother is entitled to such property. Thus, Vridha Katayana:—'Immovable property which has been given by parents to their daughter, goes always to (her) brother if she die without issue.'"

the brother before the husband. It does not speak of the mother.

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Mr. Woodroffe, for the respondent, contended that the property in dispute could not be the *stridhan* property of Prosonomoye as she took it under her father's will. *Stridhan* is only such property as a Hindu woman receives by way of gift from her husband, parents, or relatives at the time of marriage, or after marriage. One quality of *stridhan* is that a woman cannot alienate it if it consists of immoveable property. Here there is an absolute devise to Prosonomoye, and she had full power over it. It cannot therefore be *stridhan*. The case of *Prosono Joomar Ghose v. Tarrucknath Sirkar* (1) is in point. Property which a woman inherits from her father, or husband, is not *stridhan*—*Teencowree Chatterjee v. Dinonath Banerjee* (2). S. 1, Ch. IV of the *Dayabhaga* treats of the separate property of a woman, and not woman's property. [MITTER, J.—Under what class does this property fall?] It is not *stridhan*. The heirs to such property as is not *stridhan* would be the general heirs according to the Hindu law, in cases of ordinary succession to property. [MITTER, J.—The Hindu law in cases of ordinary succession applies to property left by males.] All property of a Hindu woman is not *stridhan*. The ordinary rule of succession ought to apply to the property left by a Hindu woman, which is not *stridhan*. The words implying males, used in the Hindu law in cases of ordinary succession to property, include females. When a Hindu testator gives away property by will, the gift is to be considered according to the plain meaning of the gift. According to the English law, when a man takes by will, and not by descent, he takes by purchase, that is, he is the source from which descent is to be traced. Prosonomoye took this property by purchase, and the descent is to be accordingly. The heirs are, first, her son, then her son's son, then the mother. It is only to property obtained by a woman at the time of her nuptials that the husband succeeds in preference to the mother, *Dayakrama Sangraha*, Ch. II, s. 3, para. 14. The meaning of the text of *Dayatatwa* is that the

(1) 10 B. L. R., 267.

(2) 3 W. R., 49.

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husband does not take the prominent position in succession to any other property—Dayatatwa, p. 43 (1). The passage of Divala (Dayabhaga, Ch. IV. s. 2, para. 6) does not refer to succession to all kinds of property which a Hindu woman may possess. The order of succession to the separate property of a Hindu woman is given in Dayabhaga, Ch. IV, s. 3. The heir of a childless woman is her brother—para. 13, s. 3, Ch. IV. The word ‘kindred’ is explained in para. 15, s. 3, Ch. IV. It is not to include the husband.

If the property is *stridhan*, the mother is the heir in preference to the husband—Dayabhaga, Ch. IV, s. 3, paras. 23 and 29. What is given to a woman by her kinsmen goes to her kinsmen—Dayatatwa, p. 43 (1). The mention of the brother in Dayatatwa, p. 43 (1), is the mention of one of a different descent from the husband. The succession of the husband is postponed to that of the kinsmen. So in Dayabhaga, Ch. IV, s. 3, para. 29. The husband is not a kinsman. The mother succeeds in default of the brother—Shamachurn’s Vyavastha Darpana, p. 721. The executor was therefore justified in refusing to make over the accounts to the husband. The accounts have been properly made over to the mother.

Baboo Gopal Loll Mitter in reply contended that, if the property be not considered as *stridhan*, the husband would be the preferential heir. There being no positive rule, the principles which were followed by the *rishis* should be followed in this case, *viz.*, that one who offers the funeral cake should be preferred to one who does not, and that a *gotraja* should be preferred to one who is not a *gotraja*. The main principle is the offering of the funeral cake to the manes of the dead. Here the husband has to perform the *shrad*, and not the mother. The mother is not a *gotraja*. But the term *stridhan* is comprehensive enough to include a bequest under a will. It includes all sorts of property received from the father, or any affectionate kinsmen. Para. 29, s. 3, Ch. IV, [Dayabhaga, is ambiguous. Para. 29, s. 3, Ch. IV, does not refer to the

(1) *Ante*, p. 292.

Kátáyana cited in para. 27, s. 3, Ch. IV, but to Vriddha Kátáyana, who is cited in para. 12 of the same section.

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The judgment of the Court was delivered by

MITTER, J.—The property which forms the subject-matter of this litigation originally belonged to one Hurrýnarain Mitter, who gave it by will to his daughter Prosonomoye. Soon after the death of her father, Prosonomoye married Judoonath Sircar, the plaintiff in this case, and died shortly after, leaving her husband and her mother surviving her. In this state of facts, the question we have to determine is whether the mother or the husband is entitled to inherit the property above described.

Before proceeding, however, to determine this question, we think it necessary to make a few preliminary observations on the legal character of the property in dispute. It has been argued on behalf of the respondent that this property cannot be treated as the *stirdhan* of Prosonomoye, inasmuch as it was acquired by her, not under an ordinary gift, but under a testamentary devise, a mode of disposing of property not recognized by the ancient law of the Hindus. We are of opinion, however, that this objection is not valid. Whatever might have been the ancient Hindu law on the subject, it seems to have been settled by a uniform course of decisions of unimpeachable authority that testamentary dispositions are not opposed to the spirit of that law, and we may add that, in the recent case of *Tagore v. Tagore* (1), it has been expressly held by the Privy Council that such dispositions are to be treated as a species of gift. "As to gifts by way of will," their Lordships observe, "whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions, both here and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done

(1) 9 B. L. R., 377.

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in other countries, the conveyance of property *inter vivos*. Such a disposition of property to take effect upon the death of the donor, though revocable during his lifetime, is until revocation a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if the property had been given to them during his lifetime, &c., &c. The law of wills has, however, grown up from a law which furnishes no analogy but that of gifts, and it is the duty of tribunals dealing with a case new in the instance, to be governed by the established principles and the analogies which have prevailed in like cases" (1). The above observations are, we think, sufficient to justify us in holding that the property in dispute falls within that category of *stridhan* which is described in the Hindu shasters as 'property given to a woman by her father before her marriage;' and we accordingly overrule the preliminary objection of the special respondent.

With reference to the main question itself, we are of opinion that the mother, and not the husband, is the preferential heir.

It is admitted on both sides that the case before us is governed by the Hindu law current in the Bengal school, and as the Dayabhaga is the highest of all the authorities recognized in that school, it is to the Dayabhaga that we will first direct our attention. Now cl. 29, s. 3, Ch. IV. of that treatise (Colebrooke's translation, page 95) appears to us to be conclusive on the point. That clause is as follows:—"Therefore the property goes first to the whole brothers; if there be none to the mother; if she be dead to the father; but on failure of all these, it devolves on the husband. Thus Kátáyana says.—That which has been given to her by her kindred goes on failure of kindred to her husband." It has been argued that the passage above quoted refers to that kind of *stridhan* only which is called *sulka* (fee or prequisite). But this argument is evidently founded on a mistake. The very text of Kátáyana, cited by the author in the passage in question, shows that it also refers to property given to a woman by her kindred, that is to say, by her father and

(1) 9 B. L. R., 377; see pp. 397, 398.

mother ; and if this is not sufficient to remove all doubts on the point, we have only to examine a few of the preceding clauses. In cl. 10 of the same section and chapter, the author introduces the subject by saying that "property received by a woman after her marriage from the family of her father, of her mother, or of her husband, goes to her brothers" ("not to her husband,") and in support of this position, he cites a text of Yajnavalkya, which declares "that which has been given to her by her kindred, as well as her fee or gratuity (*sulka*), and anything bestowed after marriage, her kinsmen take if she die without issue." It should be borne in mind that this text of Yajnavalkya refers to three different kinds of *stridhan*, namely, first, property given to a woman by her kindred ; second, her (*sulka*) fee or gratuity ; and third, property bestowed upon her after her marriage. In the next clause (cl. 11), the author takes up the first of these three kinds of *stridhan*, and says, that "property given by her kindred" means property "given by her father or mother." He then adds that brothers are signified by the word "kinsmen." In cl. 12 he cites a text of Vridha Katayana declaring that "immoveable property given to a woman by her parents goes always to her brother if she died without issue," and adds, that "the brother's right of succession is founded on her leaving no issue." In cl. 13 he says that, according to the opinion of Viswarupa, the brother is entitled to inherit such property without any reference whatever to the particular form of marriage, and adds that this opinion ought to be respected. In cl. 14 he says that the above rule is *a fortiori* applicable to every other kind of property. In cl. 15 he says that the phrase "given by her kindred" signifies "that which was given to her by her parents during her maiden state." In cls. 16, 17, and 18 he defines "a gift subsequent," which is the third kind of *stridhan* mentioned in the text of Yajnavalkya above referred to. In cl. 19 he takes up the second kind of *stridhan* mentioned in that text, namely, *sulka* property. In cls. 20 and 21 he explains what *sulka* means. In cls. 22, 23, 24, 25, 26, and 27 he discusses the opinions of several authors about the order of succession to be followed in regard to such property, and in v. 28 he concludes the discussion

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by saying that "in the first place it goes to brothers of the whole blood, then to the mother, and on her default to the father." It is clear, therefore, that the proposition laid down in cl. 29 is nothing but the final resume of the various matters discussed in the preceding clauses, commencing from cl. 10; and its applicability to all the three kinds of *stridhan* mentioned in the text of Yajnavalkya referred to in the last mentioned clause is, consequently, beyond all dispute. It would be absurd to contend that the author of the *Dayabhaga* has laid down, in the case of property given by a woman's kindred, a rule of succession different from that laid down by him in the case of *sulka* property, when it is beyond all question that both those kinds of property are governed by the same text of Yajnavalkya which is cited by him at the very threshold of the discussion.

The next authority to which we wish to refer is the *Dayatatwa* of Raghunandana. In page 43 of the printed copy, the author says:—"In default of barren and widowed daughters, the husband succeeds, but this does not relate to property given by parents, since in that case the brother succeeds;" and this passage clearly shows that the author of the *Dayatatwa* is of the same opinion as the author of the *Dayabhaga*. It has been said that the mother is not expressly mentioned in the passage above referred to. But this argument does not appear to us to be of any force whatever. The object of the author of the *Dayatatwa* was merely to indicate the line of succession, and not to enumerate all the heirs one after the other; and as the right of the mother and father to come in immediately after the brother did not admit of any dispute or doubt, it was sufficient for his purpose to say that the brother, and not the husband, is entitled to succeed to property given to a woman by her parents. There is nothing in the *Dayatatwa*, or in any other work on Hindu law that we are aware of, on the strength of which it can be contended that the husband is entitled to come in between the brother and the mother.

The author of *Vivada Bhagavata* also appears to be of the same opinion, as may be seen from the following text of *Kātyāyana* quoted by him in page 317 of the 4th volume of *Colebrooke's*

Digest. "On failure of her parents and brothers what she received from her kinsmen as a gift, descends to her husband" (1).

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Much stress has been laid by the pleader for the appellant on para. 3, s. 5, Ch. II of the *Dayakrama Sangraha* of Sreekiasen Turkalunkar. That paragraph is as follows:—"Next the succession devolves on the barren and widowed daughters, and in default of all daughters, the son and the rest succeed, as in the case of property received at nuptials; for a text of Menu declares:—'The wealth of a woman which has been in any manner given to her by her father and mother, let the Brahmani damsel take, or let it belong to her offspring.' " It has been argued that, in the case of property received at nuptials celebrated in the *brahma* form, the husband is entitled to come in immediately after the great-grandson of the co-wife, in preference to the brother, mother, and father; and as the marriage of the lady to whose property this dispute relates was admittedly celebrated in the *brahma* form, the plaintiff, as her husband, and not her mother, is the preferential heir under the authority of the paragraph quoted above. This contention, however, does not appear to us to be sound. No doubt, if the paragraph in question had stood alone, there might have been considerable force in the argument that the word "rest" in the phrase "the son and the rest" includes, not only all the heirs down to the great grandson of the co-wife, but also the husband, the brother, the mother, and the father, who are entitled to come in after such great-grandson. But such a construction would be directly contrary to the provisions of the 15th and 16th paragraphs of the 3rd section of the same chapter, in which it is distinctly laid down that, in the case of property given to a woman by her father and mother, the brother is entitled to succeed (without any reference whatever to the form of marriage) if she die without issue. Those two paragraphs as translated by Mr. Wynch stand as follows: *Para. 15.*—"On failure of her husband, her brother is the next successor, according to the text of Yajanavalkya:—'That which was given to her by her kindred, as well as her fee or gratuity and anything bestowed after marriage, her kinsmen take if she die without

(1) Ed. of 1801, Vol. III, ch. 9, v 512.

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issue.” *Para. 16.*—“The term ‘kindred’ means her father and mother, and consequently by the term ‘kinsmen’ her brothers are signified. The same is declared by Kátáyana, who says :— ‘Immoveable property which has been given by parents to their daughters goes always to her brother if she die without issue. Here, since the terms ‘immoveable property’ are used, other property is of course intended by the argument drawn from the loaf and staff. Thus it is stated in the Dayabhaga. By the use of the term ‘always,’ it appears that the eight forms of marriage, namely, *brahma* and the rest are included.” It should be borne in mind that the original work is not divided into chapters, sections, and paragraphs, and that there are two errors of printing in paragraph 15 as quoted above. In the first place there should be a full stop after the word “successor,” and in the next place the words “according to the text of Yajnavalkya” ought to be read as commencing a new sentence, having no connection whatever with the first portion of that paragraph (down to the word “successor”), which relates to property received by a woman at her nuptials. These two paragraphs, therefore, clearly show that there is no conflict between the Dayakrama Sangraha and Dayabhaga in regard to the brother’s right to succeed to property given to a woman by her parents if she die without issue. On the contrary the author of Dayakrama Sangraha, expressly adopts the view taken by the author of the Dayabhaga, as may be seen from the words “thus it is stated in the Dayabhaga” in paragraph 16. How then are we to reconcile these two paragraphs with para. 3, s. 3, Ch. II of the Dayakrama Sangraha. It cannot be said that the author of the Dayakrama Sangraha has been guilty of laying down to contradictory rules in two different parts of the same work, and the only way of escaping from this difficulty is to hold, as we think we are bound to do, that the word “rest” in para. 3, s. 5, Ch. II, includes all the heirs down to the great-grandson of the co-wife, but not those who are entitled to come in after such great-grandson.

For the above reasons we dismiss this special appeal, and affirm the judgment of the lower Appellate Court with costs.

Appeals dismissed.

ORIGINAL CIVIL.

*Before Mr. Justice Macpherson.*THE BANK OF HINDUSTAN CHINA AND JAPAN v. NUNDOLOLL
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March 27.*Mortgage—Jurisdiction—Suit for Foreclosure—Portion of Property in
Mofussil—Letters Patent, 1865, cl. 12—Reg. XVII of 1806.*

Where a plaint prayed for foreclosure of a mortgage, in the English form, of certain land, situated partly in Calcutta, and partly in the mofussil, and for an account, *held* that leave to sue having been obtained under cl. 12 of the Letters Patent, the Court had power to make a decree with respect to the whole of the property.

The Court in such a case has no power to follow the procedure prescribed by Reg. XVII of 1806, which relates to the foreclosure of property in the mofussil, but it is bound to see that the defendant is not, by reason of the suit being brought in the High Court, deprived of any substantial advantage which he would have had if the suit had been instituted in the Mofussil Court.

THIS suit was brought for foreclosure of a mortgage, dated 21st February 1868, of certain lands situate partly in Calcutta, and partly in the district of the 24-Pergunnas, and for an account. The plaintiff had obtained leave of the High Court to sue under s. 12 of the Letters Patent.

The plaint stated that, in July 1866, the defendant Nundololl and his father, one Gobindchunder Sen, being indebted to the plaintiff Bank in the sum of Rs. 2,25,000, executed a specially registered bond to secure the payment of that sum; that by an indenture of mortgage dated 3rd July 1866, Gobindchunder conveyed to the plaintiff Bank (amongst other property) two zemindaries, Joy-narain Ghosaul and Nowabad, situate in Zilla Chittagong, to secure the payment of the said sum to the plaintiff Bank, with interest at 12 per cent. on 31st December 1866; that by another indenture of 27th December 1866, Gobindchunder mortgaged to the plaintiff Bank a certain talook called Talook Chorebotta, situate in Zilla Chittagong, to further secure payment of the said

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sum ; that by an indenture of mortgage dated 4th September 1863, one Shosheeballah Dabee and one Hemendronauth Mookerjee conveyed to Gobindchunder Sen a zemindari, called Pergunnah Sundeep, Tarruff Bhobanychurn, situate in Zilla Chittagong, to secure the repayment to him on 4th September 1868 of Rs. 54,437-10-4, with interest at 10 per cent. ; that by another indenture of assignment and mortgage dated 29th December 1866, Gobindchunder assigned and conveyed to the plaintiff Bank, by way of sub-mortgage, the mortgage-debt of Rs. 54,437-10-4 and all other sums which might become due to him from Shosheeballah Dabee and Hemendronauth Mookerjee under the mortgage of 4th September 1863, and also his rights and interests in the said zemindari, Pergunna Sundeep, under the same mortgage ; that in April 1867, the plaintiff Bank obtained a decree against Gobindchunder Sen and Nundololl Sen in the High Court on the bond ; that about the end of 1867, Gobindchunder died, leaving the defendant Nundololl, his only son and heir and legal representative, him surviving, and Nundololl duly obtained a certificate of administration to his estate under Act XXVII of 1860 ; that by an indenture dated 21st February 1868, and made between the defendant Nundololl of the first part, the plaintiff Bank, and certain persons liquidators of the plaintiff Bank of the third part, the defendant Nundololl, in order to secure the payment by him of Rs. 2,00,000, being the balance of the said sum of Rs. 2,25,000 then due by him to the plaintiff Bank, granted and conveyed to the plaintiff Bank, their successors and assigns, an undivided moiety of and in certain pieces or parcels of land, &c., to hold the same to the use of the said Bank, their successors and assigns, absolutely, but subject to a proviso for redemption on payment by the defendant Nundololl to the Bank on 9th March 1868 of the said sum of Rs. 2,00,000, with interest at 12 per cent. per annum ; that the defendant Nundololl, on 15th September 1868, instituted a suit in the High Court against the defendant Muddosoodun Sen, the plaintiff Bank, and others, for the purpose of having the pieces or parcels of land in the indenture of mortgage of 21st February 1868 partitioned under the direction of the Court ; that on 22nd February 1869, a partition was decreed, and it was ordered that a half share of

the said pieces or parcels of land should be held by the defendant Nundololl in serveralty, but subject to the indenture of mortgage of 21st February 1868, and the other half share by the defendant Muddoosoodun, to be held by him for life, and after his death by his son or sons absolutely; that a commission of partition was issued, by virtue of which the property was partitioned as ordered, and the partition was duly confirmed by the Court on 23rd March 1871; that on 8th November 1871, the right, title, and interest of the defendant Nundololl Sen in two several parcels of the lands which had been allotted to him, numbered, respectively, 98 Puttootollah and 148 Hidaram Bonnerjee's lane, were sold by the Sheriff of Calcutta in-execution of a decree of the High Court in a suit in which Muddoosoodun Sen was plaintiff, and Nundololl Sen defendant, and the first-mentioned piece was purchased by the defendant Muddoosoodun Sen for Rs. 20, and the other by the defendant Hurrychurn Seal for Rs. 650, and they are now in their possession respectively; that save and except the said two last-mentioned properties, the whole of the premises comprised in the indenture of 21st February 1868 were in the possession of the defendant Nundololl Sen; that the defendant Nundololl Sen made default in payment of the balance due to the plaintiff Bank in respect of the said sum of Rs. 2,25,000 and interest so due under the bond and decree and the several mortgages, and there was still due to the plaintiff Bank the sum of Rs. 1,79,566-15-5, with interest at 6 per cent. from 31st December 1870; that on 13th September 1869, the plaintiff Bank applied to the District Judge of Chittagong under ss. 8 and 9 of Regulation XVII of 1806 for the foreclosure of the Mortgages of 3rd July 1866, 27th December 1866, and by an order of the said Judge on 14th December 1869, which was duly notified to the defendant as by that regulation required, one year was allowed to the defendant Nundololl, as heir and legal representative of Gobindchunder Sen, within which to redeem the said zemindaries; that the defendant Nundololl failed to redeem, and the estate and interest of the plaintiff Bank under the said two mortgage-deeds had become absolute, but the defendant Nundololl still retained possession of the properties comprised therein; that Shosheeballah Dabee and Hemendronauth

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Mookerjee made default in payment of the interest secured by the indenture of mortgage of 4th September 1863, and Gobindchunder Sen, without waiting for the expiration of the time limited for payment of the principle, sum secured thereby, obtained an order from the Judge of Chittagong under Regulation XVII of 1806 for the foreclosure of the zemindaries comprised in the mortgage, and Shosheeballah Dabee and Hemendronauth Mookerjee having failed to redeem, Nundololl Sen on 15th April 1868 filed his suit for possession of the said zemindaries, and on 18th March 1869, obtained a decree therefor; that Shosheeballah Dabee and Hemendronauth appealed to the High Court against that decree, and in April 1870, it was reversed on the ground that the principle debt, secured by the mortgage of 4th September 1863, was not due at the date of the institution of the foreclosure proceedings by Gobindchunder (1); that Nundololl on 12th January 1871 filed a petition in the Court of the Judge of Chittagong, praying for foreclosure of the said mortgage of 4th September 1863, and an order for foreclosure was made according to the provisions of the Regulation XVII of 1806, and was duly notified to Shosheeballah Dabee and Hemendronauth, who made default in payment, and thereby rendered the estate and interest of Nundololl Sen in the zemindari absolute, but he having taken no steps to obtain possession, they still retained possession of the said zemindari; that on 23rd October 1870, the plaintiff Bank filed a petition in the Court of the District Judge of Chittagong, praying for foreclosure of the mortgage of 29th December 1866, and on 26th August 1871, the usual foreclosure notice under Regulation XVII of 1806 was issued, and was duly notified to the defendant Nundololl, but the defendant did not redeem, and the interest, and estate of the plaintiff Bank in the said zemindari became absolute, and they became entitled to absolute possession thereof; and that the plaintiff Bank had also foreclosed the defendant Nundololl of the equity of redemption in a certain piece of land at Tangra in the 24-Pergunnas, mortgaged to the plaintiff Bank by the mortgage of 3rd July 1866, and had obtained

(1) See 5 B. L. R., 389.

possession of the same. The plaintiff Bank offered in taking the accounts to credit the defendant Nundoololl with Rs.45,000 under the mortgages of 3rd July 1866 and 27th December 1866; Rs. 90,000 under the mortgage of 29th December 1866, being, as they believed the true values of the properties, comprised in the said mortgages: they also afford the credit the defendant with Rs. 1,400 for the piece of land in the 24-Pergunnas. The plaintiff Bank also stated that, with reference to certain properties described in the mortgage 21st February 1868, which were subject to a first mortgage to the Agra Bank, dated 22nd November 1867, they did not at present seek any relief, being advised that the equity of redemption was practically worthless. The plaintiff Bank prayed that an account might be taken of what was due to them under the mortgage of 21st February 1868; that the defendant might be directed to pay at an early date such sum as might be found due; and that on default of payment, the mortgage might be foreclosed, and the plaintiff Bank declared entitled to, and put into possession of, the properties comprised in the said mortgage. The plaintiff further prayed that, if the Court should be of opinion that the law and practice obtaining with the respect to the foreclosure of lands in Calcutta is applicable to lands situate out of and beyond the local limits of the Court, then the relief as before prayed might be granted with respect to that portion of the lands, &c., as were situate within the limits of the ordinary original jurisdiction of the Court, and that in respect of the lands, &c., which were situate beyond such limits, notice of foreclosure and such other proceedings as might be necessary or proper for the purpose of foreclosure of such lands, &c., might be issued and had in conformity with ss. 8 and 9 of Regulation XVII of 1866.

The defendant Nundoololl stated in his written statement that no accounts had been taken, and that no state sum was due by him to the plaintiff Bank as alleged; that with regard to the lands in respect of which the plaintiff Bank did not ask for any present relief, they should, if they did not desire to release or foreclose them, abandon all right against them; that the sums stated by the plaintiff Bank to be the values of the

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properties they sought to get possession of were much less than the proper values of the properties ; that the plaintiff Bank were not at liberty at one and the same time to claim them as their absolute property and to offer the defendant a price for them ; that the proceedings of the plaintiff Bank had been oppressive, irregular, and illegal, and had caused much damage to the defendant Nundololl ; that under the decree of 30th April 1867, the plaintiff Bank, on 26th November 1869, obtained a prohibitory order against certain premises in Calcutta not included in the said mortgager, and sold the said premises for Rs. 1,450 ; that under the said decree, the plaintiff Bank sold the defendant's dwelling-house at Goriffa, being one of the properties included in the mortgages in the 24-Pergunnas, on 3rd April 1871 for Rs. 4,200 ; that the plaintiff Bank had under the said decree repeatedly sued out process for the arrest of the defendant Nundololl, and several times since the termination of the foreclosure suits, although the decree was obtained on a bond which stood as collateral security for the same debts as were secured by the mortgages so foreclosed ; and that the defendant, Nundololl had paid off Rs. 90,000, or thereabouts, of the moneys due by him to the plaintiff Bank, and had been prevented by their harassing and vexatious conduct from realizing his property, which he believed if properly sold would be sufficient to pay off his debts. The defendant Nundololl submitted to the Court the legal effect of the proceedings of the plaintiff Bank as to the foreclosures dated 13th September and 14th December 1869, and also of the proceedings of the plaintiff Bank as to whether the foreclosures had extinguished the debt or any and what part of it, or whether the execution-proceedings had reopened the foreclosure, and contended, in no event ought he to be ordered to pay the costs of the irregular proceedings of the plaintiff Bank.

The case came on for settlement of issues.

Mr. Woodroffe (The Advocate-General offg. (Mr. Paul) with him) for the plaintiffs.

Mr. *Evans* (Mr. *Kennedy* with him) for the defendant Nundololl.

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The defendant Hemendronath Mookerjee in person.

The defendant Muddoosoodun did not appear.

Mr. *Woodroffe*, for the plaintiffs contended that the Court had jurisdiction to entertain the suit; that the plaintiffs were entitled to absolute foreclosure of the properties in suit; that the land could not be dealt with by the Court under Regulation XVII of 1860; that the proceedings of the plaintiffs did not prevent them from obtaining the relief they asked for in the suit; and that the bringing the present suit did not necessarily open out the foreclosures which had been already obtained. He cited *Syed Vellaet Ali Khan v. Ramadheen Singh* (1) *Bholanath Oondoo Chowdhry v. Unodapersad Roy* (2), *Doe d Chuttoo Sick Jemadar v. Subbessur Sein* (3), and *Srimati. Sarasibala Debi v. Nand Lal Sen* (4).

Mr. *Evans*, for the defendant Nundololl, contended that, when a mortgagee enforces his deed of conditional sale, he takes the land for all his rights; that the plaintiffs having proceeded in other ways and obtained foreclosure of mortgages given as security for the same sum, the debt must now be taken as satisfied; that the provisions of regulation XVII of 1806 could be put in force in this Court, if the Court should hold that the suit would lie; that with respect to the land in the mofussil, until proceedings are taken under s. 8 of the Regulation, no absolute interest passes under a conditional sale, and therefore the right of the mortgagor to redeem cannot be taken away; see *Mahesh Chandra Sen v. Tarini* (5); and so long as any portion of the property is redeemable, the whole is redeemable. If the foreclosure cannot be opened, the plaintiffs have lost all right to proceed for the money, as they cannot give back the property; they have

(1) 7 S. D. A. (1851), 648.

(4) 5 B. L. R., 389.

(2) 1 Boul., 97,

(5) 1 B. L. R., F. B., 14.

(3) 2 Boul., 151

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put the property out of the power of the Court; they have executed their money-decree subsequent to the foreclosure of the mortgage; where this is done, the English law says the mortgagee cannot get back his money, as he cannot give the mortgagor any reciprocal right of redemption. He cited *Mussamut Doorga Koomwur v. Chedee Lal* (1), Macpherson on Mortgages, 5th ed., p. 197; Fisher on Mortgages, vol. 2, p. 997; and *Radha Cooma Singh v. Luchmee Chund Marwaree* (2).

Mr. Woodroffe in reply.—The cases cited do not support the defendant's contention. The passage from Fisher on Mortgages³ refers to a case where the mortgagee has obtained foreclosure and has sold the property, being in possession of it, to some third person. The case of *Radha Coomar Singh v. Luchmee Chund Marwaree* (2) is opposed to a Full Bench decision in *Gupinath Singh v. Sheo Sahay Singh* (3); see also *Sheikh Mahomed Buksh v. Thakoor Dyal Singh* (4) and *Bolakee Lall v. Chowdhry Bungsee Singh* (5).

Our. adv. vult.

MACPHERSON, J.—this suit having come on for settlement of issues, the matters in dispute between the parties have been argued, and it is agreed by Mr. Woodroffe and Mr. Evans, and is clear, that it is unnecessary to set the cause down for further hearing.

I think that the suit will lie: leave to sue in this Court was obtained when the plaint was filed, and therefore under the peculiar state of facts shown by the plaint, the suit will lie, though some of the properties which are the subject of it are situated in the mofussil.

But the suit being here, it is impossible that, in foreclosing the mortgages of the lands which lie out of Calcutta, I should follow the procedure prescribed by the Regulation for the foreclosure of mofussil mortgages. This Court has no means of carrying

(1) 12 S. D. A. (1856), 388.

(4) 1 W. R., 366.

(2) 3 W. R., Mis., 16.

(5) 7 W. R., 309.

(3) B. L. R., Sup. Vol., 72.

out a foreclosure under that procedure. At the same time (on the principles indicated in the case of *Doe d Chuttoo Sheick Jemadar v. Subbessur Sein* (1)), I ought to see that the defendant is not by reason of the suit being brought in this Court deprived of any substantial advantage which he would have had if the suit had been instituted in a Court in the mofussil. For example, as the defendant, if sued in the mofussil, would have had what is called his year of grace within which he might redeem, so here he should have a full corresponding year allowed him before making the foreclosure absolute. The parties having contracted in the English form, there is no hardship or injustice to the defendant in dealing with the case in the manner in which I propose to treat it. It is true that, to a certain extent, mortgages of lands in the mofussil, drawn up in the English language and in the form of an ordinary English mortgage, have been treated as common *bye-bil-wafas*, or deeds of conditional-sale. But that has been merely with reference to the one question of the procedure to be gone through in order to obtain foreclosure. In an ordinary Bengali *bye-bil-wafa* it appears on the face of the document itself that the parties intend that, if the mortgagor does not pay the money due, the conditional sale shall become absolute, and the property shall remain finally with the mortgagee in lieu of the debt. Where such intention is apparent, the mofussil Courts have held, and with good reason, that the creditor must look to the land only and has no remedy against the other property, or the person of the mortgagor. But the intention and contract are wholly different in a mortgage in the common English form, where personal and general liability is always contracted for, in addition to the security afforded by the mortgage of the land.

It seems to me there is nothing in the argument that, because some of the earlier mortgages have been foreclosed by reason of the non-payment of this same debt, therefore the debt is now to be deemed to be satisfied. Whether it is so or not, according to English law, in an ordinary and simple case, where there is but one debt and one security' to apply such a rule, in

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an exceptional case like the present, would be wholly inequitable and wrong, as being contrary to the express intention of the parties as testified in the several deeds executed by them.

The Regulations which lay down the law on the subject of mortgages to be applied in the Courts in the mofussil never contemplated a case like this now before me ; and they make no provision for such a case. No mofussil Court in truth has any machinery with which to deal properly with such a matter as this.

In my opinion the English law does not indicate that the plaintiffs' right to recover their money is one way or other would be barred by the foreclosures which have been already obtained ; although no doubt the institution of this suit would reopen the foreclosures, and let the defendant in to redeem. I quite think that if the defendant now chooses to pay off the debt, the foreclosures should be set aside, and doubtless the plaintiffs will be well pleased to be paid off on such terms.

There is no question that now the position of the parties is thoroughly complicated and exceptionable. It is impossible to value properties which have been foreclosed until the plaintiffs get possession of them, and therefore I look upon it as essential that the plaintiffs should take all necessary steps without delay to complete their foreclosure by getting possession. Once they are in possession, it will be possible to ascertain how far the debt should be treated as paid off by these foreclosures ; till that is done, it is impossible to say how the account really stands between the parties, and impossible to proceed to deal with the properties mortgaged in the latter deed, which is the basis of this suit.

I shall direct an account of what is due on the mortgage, and that, (in order to the taking of that account) the plaintiffs do at once take all necessary steps towards getting possession of the properties which they have foreclosed ; and that the defendant do all things in his power to give full and beneficial possession to the plaintiffs, and to assist them in obtaining it. Then there will be an enquiry as to the value of the properties of which the plaintiffs shall get possession, and as to the value of the Tangra property of which they have already got possession ; and when these values have been ascertained, the account must be finally taken.

Baboo Chunder Madhub Ghose and Nilmadub Sen for the respondents Pertum Singh and Nawab Singh.

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Mr. Woodroffe contended that there was not sufficient evidence to show that there was legal necessity for the loan. The rent reserved by the *ticca* lease was inadequate. The property in dispute formed portion of an impartible raj. The father had no right to create an incumbrance on the estate. There is no dispute as to its being an impartible raj. The learned Counsel cited *Maharani Hiranath Koer v. Baboo Ramnarayan Singh* (1), *Katama Natchier v. The Rajah of Shivagunga* (2), *Nilkristo Deb Barmano v. Bir Chandra Thakur* (3), and *Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee* (4).

Mr. C. Gregory contended that the bond did not create any incumbrance on immoveable property. The *ticca* lease was a separate transaction. There was acquiescence on the part of the plaintiff. His cause of action arose when Radhay Singh and others took possession of the property. He cannot now contest the validity of the lease. The case of *Maharani Hiranath Koer v. Baboo Ramnarayan Singh* (1) is not applicable to the present suit. The property in dispute not being a joint family property, the plaintiff is bound to show that his father could not alienate.

Baboo Chunder Madhub Ghose contended that there was no cause of action against Pertum Singh and Nawab Singh. The plaintiff has failed to prove that the transaction was a nominal one:

Mr. Woodroffe, in reply, cited *Stree Rajah Yaunmula Venkayamah v. Stree Rajah Yaunmula Boochia Vankondora* (5).

The judgment of the Court was delivered by

PHEAR, J.—With regard to the principal issue of fact in this case, we concur in the finding of the lower Court. It appears

(1) 9 B. L. R., 274.

(2) 9 Moore's I. A., 539.

(3) 3 B. L. R., P. C., 13; S. C., 12.
Moore's I. A., 523.

(4) 12 Moore's I. A., 1.

(5) 13 Moore's I. A., 333,

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to us that the granting of the *ticca* potta, and the execution of the bond, were but two steps in one transaction by which the plaintiff's father secured to the bond-holder at least the repayment of the interest stipulated for in the bond, by means of the rents reserved in the *ticca* lease. It is almost impossible, I think, to take any other view of the matter. The story set up by the defendant, amounting really to a statement on the part of the bond-holder and the *ticcadars*, relatives on intimate terms of association with each other as they were, that each was quite ignorant of the dealing of the other with the plaintiff's father, is entirely unworthy of credit. And then there is the very significant fact that the period of the lease just exceeds the period of maturity of the bond-debt, if I may use the term, i.e., by two or three months only : eleven years was the period in one case, and ten years and three-fourths in the other. We agree with the Subordinate Judge that this was one transaction, and we think that it has the character of a mortgage transaction to the extent which I have mentioned. It was, therefore, clearly, for the period during which the *ticca* potta was expressed to endure, an incumbrance upon the estate.

We also think, on the evidence which has been brought before us, that the *ticca* rent reserved by the potta was, as the plaintiff terms it, an inadequate rent. The jumabandi papers proved by the plaintiff's witness, the *patwari*, coupled with his own testimony, is *prima facie* evidence at any rate, going to show that the assets of the property which was the subject of the *ticca* lease amounted to somewhere about Rs. 4,000 per annum, during pretty nearly the whole period, and this evidence has not been met by the defendants in any way whatever. It is obvious that, if this evidence was untrue, the defendants had the very best possible means in their power of showing that it was so. The *ticcadars* for some nine years previous to suit had been the actual receivers of the rents and profits of this estate. They could have shown to a pice what it was that they realized during the whole of that period. They have in truth given no evidence as to the amount of rents and profits which they realized. To my mind the conclusion is inevitable that the case of the plaintiff in this respect is a true one. I therefore think, not only that

the original transaction was a transaction having the character of a mortgage, a transaction which had for its purpose at any rate to secure to the bond-holder the payment of the interest due on his bond, but also that the *ticca* itself was a grant of a very beneficial character to the grantee ; so that the grant, independently of its forming part of the mortgage transaction, would be an incumbrance upon the estate. In other words the incumbrance effected by the assignment of the *ticca* rent to secure the payment of the interest on the bond was increased by reason of the inadequacy of that rent. With this view of the facts of the case, it remains to be considered whether the plaintiff had a right to ask for possession and enjoyment of the property free of these incumbrances which his father had put upon it.

Thus we come to the question whether the father held and enjoyed the property with the incidental power of alienating or incumbering it as against his successors.

It is perhaps somewhat unfortunate that no issue of fact was distinctly raised in the Court below for the purpose of ascertaining the nature of the father's proprietary right in this property. But we have it asserted in the plaint, and not contradicted by the defendants, that the property in question had descended to the plaintiff's father from his father. It was therefore in the hands of the plaintiff's father an ancestral property as distinguished from a self-acquired property ; and its incidents and the rules which would govern its descent, would therefore be those prescribed by the general law of the land in that part of the country, namely, by the Mitakshara law, excepting so far as that might be controlled or overridden by the operation of an established custom or other special authority. And in the absence of any such exceptional disturbing force, I need hardly say that one of the incidents of ancestral property in the hands of the father (as I have just observed this property was) would be that he would have no power of alienation or of incumbering as against any members of the family who were joint with him in respect of his property.

Now, admittedly, the present plaintiff was born during the lifetime of his father and while the father had this property ; and

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therefore by the Mitakshara law, if it operated uncontrolled' the plaintiff immediately became joined with his father as regards right to his ancestral property, and any alienation or incumbrance which the father at any time should make without his concurrence would be void as against him, unless it was justified by family necessity.

In this way I think we have reached a point in the case, at which we must enquire whether there has been any established custom or any other established authority proved such as had the effect of overruling the general law, the Mitakshara law, which otherwise would govern the incidents and descents of this property.

Some such custom or authority has been made out to a certain extent, or rather we must take it that there is in this case something of the kind active. For the plaintiff in his plaint asserts that this property is impartible amongst the members of the joint family, and descends from the hands of the father to those of the eldest son, if he has sons, and so on : in other words that it is not in any form divided or distributed in possession amongst the members of the joint family. This must be of course under the coercion, and as the effect, of some authority external to the Mitakshara law. The defendant does not deny this, and consequently we must take that as a fact in the case. But that fact does not go further than the plaintiff has asserted it: it goes no further than the result which I have mentioned, namely, that this joint family property is not partible amongst members of the joint family, but goes on the decease of the last holder to the hands of the elder member in lineal descent of the joint family. If then the custom or authority has this effect, and so far controls the general law, but does not go further, there must still remain the other incidents which I before drew attention to, namely, one amongst others, that the holder of the property cannot alienate any portion of it, excepting for a family necessity, without the consent of all the members of the joint family. It seems to me that in arriving at this position, we have the authority of the Privy Council expressed in several judgments ; in particular it is expressed in the judgment in the case of *Strer Rajah Yammula*

Venkayamah v. Stree Rajah Yaunmala Boochia Vankondora (1) on which Mr. Woodroffe very greatly relied yesterday. Another case, in which the like doctrine has been lately enunciated by a judgment of this Court, is *Maharani Hiranath Koer v. Baboo Ramnarayan Singh* (2). One of the learned Judges of this Court who pronounced an opinion in that matter differed in regard to the final result from the other members of the Court: but it seems to me upon the best consideration which I have been able to give to all the judgments reported in that case that in reality he did not materially differ from the other Judges in his view of the principles which ought to govern the case. He appears to have been of opinion that the property which was there the subject of suit did exist in the condition of separate property in the hands of every successive taker. It is possible, I think, that the facts and circumstances of the enjoyment of a particular subject of property may be such as to bring about this result, and probably a peculiar state of things in this respect will account for the special character of the judgment which was given by the Privy Council in the *Tipperah* case (2). There were some expressions thrown out by their Lordships in the Privy Council in the *Tipperah* case (2) and by some of the learned Judges who gave judgment in the case of *Maharani Hiranath Koer v. Baboo Ramnarayan Singh* (3) which seem to imply that there is a different law of descent in the case of what is termed a separate property, from the law of descent in the case of joint property. I do not myself readily accept that view. The distinction between joint property and separate property under the Mittakshara law appears to me to be simply of a temporary, not of an abiding, character. Property is joint when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs only to one member of a joint family alone, and not to the others jointly with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal

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(1) 13 Moore's I. A., 333.

(2) 3 B. L. R., P. C., 13; S. C., 12 Moore's I. A., 523.

(3) 9 B. L. R. 274.

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of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property—the property of several persons united together as a joint family with regard to it—the property of a new joint family springing from a new root, and it continues to go down by one rule of descent only. As I understand the matter, there is substantially no different rule prevailing in the one case, and in the other. It is simply the occurrence of a fresh starting point for a new joint family which makes the distinction between the two cases. While the joint family endures, there is, strictly speaking, no question as to succession to the property. The joint family is a corporation in the sense of having a continuous existence notwithstanding the death of individual members; and it is now settled that under the Mitakshara law no individual member of the family has any specific interest in the property, or the power of creating any for himself, independently of the other members: he has only a right to insist upon a partition being effected by all. But by the nature of the case, the joint family must commence, and also must end, when it does end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family. Thus the Mitakshara law itself does nothing to keep property in the condition of being separate property throughout a series of takers, and indeed is hostile to such a state of things. If, however, in any given case property is so situated that it does pass from one taker to another taker, just in the same condition as if it were the separate self-acquired property of each of them personally, independently of the family element, then this result I conceive can only be brought about, if at all, by the operation of some established custom or authority controlling the general Mitakshara law. The Privy Council appear to have been of opinion in the *Tipperah* case (1) to which I have already alluded that some result of this kind arose

(1) 3 B. L. R., P. C., 13; S.C., 12 Moore's I. A., 523.

out of the state of facts before them. But in the case which is now before us, and in the other cases in this Court to which I have just referred, there is an entire absence from the facts of any authority or custom, if any there could be, which should have the effect of making the property separate property, and not joint family property, as it passess into the hands of the successive takers. It appears to me then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its pertibility amongst the existing joint members of the family; and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards his property, to alienate or incumber the estate, excepting upon a justification of a family necessity. No such ground justifying the father's deeds of 21st and 22nd Asar (13th and 14th July) has been even attempted to be proved.

The result to my mind is that the plaintiff is entitled to have it declared that the two deeds, the *ticca potta* and the bond of the 21st and 22nd of Asar (13th and 14th July), had the effect of placing an incumbrance on the estate, and that the plaintiff was entitled, to have possession of the property at the time of his father's death free from that incumbrance. The plaintiff must have his costs in both the Courts.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr Justice Pontifex.
KEDERNATH DUTT AND ANOTHER (TWO OF THE DEFENDANTS) v. SHAMLOLL KHETTRY AND OTHERS (PLAINTFFS).

1873
 March 27 &
 June 9.

Equitable Mortgage—Unregistered Document—Evidence Act (1 of 1872), s.91—Registration Act (VIII of 1871), s.17.

The defendant deposited certain title-deeds with the plaintiff as security for the repayment of Rs. 1,200 lent him by the plaintiff at the time when the deposit was made. On the evening of the same day, the defendant by way of further

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security, gave to the plaintiff a promissory note for the amount of the loan, and, endorsed thereon the following memorandum:—"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with 'the plaintiff' as a collateral security by way of equitable mortgage title-deeds of my property, &c." Held that the memorandum did not require registration.

The equitable mortgage was complete without the memorandum, the memorandum was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred.

APPEAL from the judgment and decree of Macpherson, J., dated 5th February 1873. The suit was brought for a declaration of the plaintiff's right as equitable mortgage of certain premises situate at No. 11 in Fukeer Chand Mitter's Street at Mirzapore in Calcutta, for an account, and for foreclosure or sale on default in payment of the amount which might be found to be due to the plaintiff under the mortgage. The plaintiff stated in his plaint that he had on the 29th of March 1871 lent to Woomachurn Banerjee, one of the defendants, Rs. 1,200; that Woomachurn Banerjee then and there deposited with him, as security for the repayment of the loan and by way of equitable mortgage, the title-deeds of the property in dispute and further gave him a promissory note for the amount; that at the time of making the promissory note, Woomachurn Banerjee endorsed thereupon the following memorandum:—

"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with Baboo Shamlall Khettry, as a collateral security by way of equitable mortgage, title-deeds of my property situate at No. 11 in Fukeer Chand Mitter's Street at Mirzapore in Calcutta ;"

that since the time of the deposit, the title-deeds had remained in his, the plaintiff's hands; that in execution of a decree against Woomachurn Banerjee, the property in suit was put up for sale by the Sheriff of Calcutta, and purchased on the 28th November 1872 by the defendants Kedarnath Dutt and Madhub Chunder Bose, who had full notice of the plaintiff's claim, he having given notice of his claim

some of the money. It then appears that the sheristadar sent for the pleader and told him that he was a young hand, and that if he drove such hard bargains with his clients at the outset of his career, he would get a bad name, and would do himself more harm than good, and eventually, after considerable reluctance, Peary Mohun, having consulted a friend as to whether the banker Ram Lochun was a trustworthy man or not, agreed to disgorge Rs. 250 out of the Rs. 475, which he had taken from the Munsif's brother-in-law. This sum of Rs. 250 remained at the credit of Peary Mohun Goocho in the accounts of Ram Lochun. There therefore remained still in the hands of the pleader Rs. 225; he says that of this sum Rs. 25 were paid to his mohurrir, and that Rs. 140 were paid to the brother-in-law of the Munsif as his commission, and that the balance was kept by him. The brother-in-law of the Munsif distinctly denies the receipt of the Rs. 140, and he also states that the receipt which has been put in by the pleader, the signature on which is wanting, having been torn out from the body of that receipt, is not genuine. The Judge, after carefully considering the evidence, is of opinion that the pleader Peary Mohun Goocho has told a falsehood in alleging that he paid Rs. 140 to the brother-in-law of the Munsif, and taking into consideration the youth of Peary Mohun Goocho, the short time he has been practising as a vakeel, and his ignorance of his duties to his clients, he has recommended that the pleader be suspended from practice for a period of one year.

We think that we cannot say that the Judge has come to a wrong conclusion on the evidence in respect of this receipt, but beyond that, even supposing there was a doubt as to whether this receipt was ever executed by the brother-in-law of the Munsif, and as to whether the money really passed, we think there are other circumstances in the case which disclose on the part of the pleader conduct of a fraudulent and grossly improper character. It is clear from his own admission that he had not earned the money when he induced the brother-in-law of the Munsif, on the understanding of receiving a very large portion of the fee in the shape of commission, to make over to him the whole sum before he had taken any action whatever in the case. It was

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only the remonstrances of the sheristadar, and the action of the Munsif, a Government officer, in the matter, which induced the pleader to give up any portion of the sum which he had taken from the Munsif's brother-in-law, and even in giving up the larger portion of the fee, he took very good care, as far he possibly could, that that sum should not remain in the hands of any person connected with the Munsif, but should be placed at his credit in deposit with a third party. If the man Radha Chowdry had been a mooktear of the Court, even then looking to the nature of the case, and the position of the pleader in the Zilla Court, we should consider the fee a very exorbitant one, and the commission of the mooktear very unusual, still we should not have looked upon the offence committed as one of so serious a nature as we think it is. But when the party was not a mooktear of the Court, but a relation of the party, at whose expense the services of the pleader were to be retained, we think that the conduct of the pleader in this case in inducing the Munsif's relation to borrow money, for he was obliged to borrow money to meet the exorbitant fee of the pleader, well knowing that he was not a mooktear of the Court, that he was a relation of the Munsif, and that the inducement he held out to him to join in this exorbitant demand upon the Munsif was that he would get the large sum of Rs. 140 out of the amount which would be so taken from the Munsif, is highly reprehensible. We confirm the order of the Judge, and suspend the pleader Peary Mohun Goocho for a period of one year, to count from the date on which the Judge's order was passed.

PONTIFEX, J.—I am of the same opinion. In this case it seems to me from the whole conduct of the suspended pleader, if not for the reasons mentioned by the Judge, that it would be undesirable to interfere with the sentence of one year's suspension passed upon the pleader by the District Judge. If in these cases the mooktear is paid for his service by his employer, and in addition receive, without the knowledge of his employer, a percent age or commission from the pleader, it seems to me that the mooktear might be answerable, not only in the Civil Court, but also in the Criminal Court, on the action of his employer, to a charge of obtaining money from him improperly.

PRIVY COUNCIL.

BABOO GUNNESH DUTT SINGH (PLAINTIFF) v. MUGNEERAM CHOWDHRY AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

P. C. *
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July. 25.

*Malicious Prosecution—Libel—Witnesses' Privilege—Evidence—
Onus Probandi.*

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false, they should be proceeded against by an indictment for perjury.

In an action for damages for a malicious prosecution, it is not sufficient to prove merely the dismissal of the charge. It must be proved that the prosecution was without reasonable and probable cause.

This was an appeal from a decision of the High Court (Bayley and Pundit, JJ.) of the 7th March 1866 (1), reversing a decree of the Principal Sudder Ameen of Tirhoot of the 24th June 1865.

The suit was brought by the plaintiff, who was a near relative of the Raja of Durbungah, against three landholders in the district and two of their servants, to recover damages for defamation of character.

Disputes had for some time been going on between the Chowdhrys (defendants) and the plaintiff. An affray took place between a tenant of the plaintiff and the Chowdhrys, and one of the latter, Kirtee Narain Chowdhry, was killed. On the 8th December 1863, the respondent Mugneeram Chowdhry appeared before the Assistant Magistrate at Durbungah, and stated, *inter alia*, that the deceased and the respondent Seetaram Chowdhry had on the 6th December accompanied two peons of the Court of the Principal Sudder Ameen, who had come to attach the crops on the ground in dispute; and that on their arrival there they

*Present:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR M. E. SMITH, SIR B. P. COLLIER, AND, SIR LAWRENCE BEECH.

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found the crops cut, and the appellant there with armed men, whom he ordered to attack the deponent party, which was done, and Kirtee Chowdhry killed. On this information, the Magistrate, on the same day, ordered the arrest of the appellant and his son, together with others charged by Mugneeram, and on the following day at noon, the appellant appeared and surrendered himself to the Magistrate. He was kept in arrest, and afterwards sent forward in arrest to Durbungah, and on the following day, the 9th of December, enlarged on entering into his own recognizance and giving security, but he was obliged to attend the Magistrate's Court from day to day till the conclusion of the enquiry as against him. On the 14th of December, Bhugwant Chowdhry, one of the respondents, gave his deposition before the Magistrate, in which he stated that he had gone on the 6th to the scene of the affray, and there found the corpse of Kirtee and certain wounded persons, and had been told that the attack had been made by the men belonging to the appellant and his son. He had, in his information given on the 6th, when he appeared, not as a mere informant, but as a complainant along with the other Chowdhrys respondents, charged the appellant with the murder of the deceased Kirtee. The other respondent Chowdhrys also gave their depositions against the appellant. On the 14th of December, the Magistrate also examined the Court peons, Keramut Khan and Deedar Bux, who said they had gone to attach the grain on the lands in dispute. They spoke to an affray having taken place, but did not depose to recognizing the appellant as being present there, or his son. On the 29th of December 1863, the Magistrate, having heard all the evidence for the prosecution, dismissed the case as against the appellant and his son, but committed Sookun Lall thakoor, the appellant's tenant and others, to the Sessions. On the 2nd of January 1864, the Magistrate made a further order, in which he said that the evidence offered had failed to show that the appellant was present, but fined him Rs. 500 on a wholly different viz. ground, under the provisions of s. 154 of the Indian Penal Code, for not giving timely information of, and exerting himself to prevent, an apprehended affray. Of the parties committed to the Sessions, all were acquitted except

one, Sheikh Lallan, who was convicted and sentenced to four years' imprisonment on the 22nd March 1864. On the 31st of August, the respondent Seetaram Chowdhary presented a petition to the High Court, in which he repeated all the same accusations against the appellant, and charged him with having given orders for the attack on Kirtee Chowdhry, and complained of the irregularity of the proceedings of the Magistrate and Judge, and asked that the High Court should, under its powers of supervision, direct the Judge to proceed with the case, after ordering the Magistrate to commit the defendants to his Court. On the 21st of November 1864, the High Court called on the Judge for an explanation which was given by the Judge on the 16th December 1864, and on receipt of it the High Court declined to interfere. In the explanation submitted by the Judge, the following passage occurred :—" The Assistant Magistrate, who committed several persons on charges of riot, &c., spoilt the case by sending in two sets of witnesses for the prosecution, who contradicted each other."

The appellant, having been required to give bail and enter into recognizances, on the 29th of September 1864, filed his plaint in the Court the Principal Sudder Ameen of Zillah Tirhoot against the respondents, together with two other defendants, to recover damages for the defamation of his character, on the ground that the charges made against him were false and malicious.

The respondents Gourree Dutt Chowdhry, Ajmut Roy, and Bhugwant Narain Chowdhry, put in their written statements. The two first named asserted that they had nothing to do with the case, further than having been called as witnesses, and were not liable to the plaintiff's claim, and the last submitted that the mere fact of his having been the person to give information did not make him liable. None of these three at all repeated or attempted to justify the imputation made against the appellant. On the 2nd of March, the respondents Mugneeram and Seetaram Chowdhry put in their written statements in which they justified the imputation to the fullest extent, and maintained that the appellant was guilty of the charge, and that it was well proved before the Magistrate :—

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On 14th March 1865, the following issues were settled :—

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"1. Is there any proof of the existence of any enmity between the litigant parties previous to the commencement of the criminal prosecution? If it be in the affirmative, then, whether or not the charge of complicity in the wilful murder of Kirtee Chowdhry, deceased, preferred against the plaintiff by the defendants of the first party, simply originated from motives of humiliating the plaintiff, and was therefore entirely groundless; and if the charge did emanate from such malicious motives, then, how far has the plaintiff been disgraced by it; to what damages can he be entitled for it; and against which of the defendants can such damages be adjudged?"

"2. Whether the allegations of the defendants Nos. 1 and 5 of the first party as to the truthfulness of the charge of complicity preferred by them against the plaintiff, and to his having sustained no loss of honor by his attendance before the Magistrate on bail, is true or not?"

"3. Is the statement of the remaining defendants of the first and second parties, regarding an absence of all connection on their part with the criminal case in question, fit to be admitted by the Court?"

The plaintiff examined four witnesses, viz., Amarut Ali who deposed to the effect that he was a servant of the plaintiff and in constant attendance on him; that bad feeling had existed between his master and the Chowdhrys in consequence of their unsuccessful attempts to obtain land; and that an affray took place between Sookhun Thakur and the defendants, when Kirtee Chowdhry lost his life, of which the defendants took advantage, and charged the plaintiff with murder. He spoke of the plaintiff's being arrested and kept in custody and then bailed.

The second Nisheeb Nusser deposed that Ram Dutt Chowdhry conducted the criminal case against the plaintiff, and that Gourree Dutt and Ajmut Roy were his servants.

The third Sunker Dutt Jha, one of the plaintiff's managers, deposed to the same effect as the first witness.

The fourth witness Bhurea Doss deposed to Ram Dutt Chowdhry having managed the case.

Evidence as to the plaintiff's character was also given.

The defendants did not offer their own evidence, or call any witness, to prove that the plaintiff had been present at the affray, or had given orders to attack, or that he had been in any degree connected with it.

On the 24th of June 1865, the Principal Sudder Ameen gave his decree in the case, awarding the appellant as damages 20,000 rupees with costs to be paid by the respondents, and dismissed the suit as against the defendants Ram Dutt Chowdhry and Nand Coomar Chowdhry.

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He held on the first issue that it was proved by the evidence that the plaintiff and defendants had been at variance before the death of Kirtee Narain Chowdhry, and that the plaintiff having been successful in the litigation which arose as to the digging of a tank, and the alleged rent-free lands, it had "engendered feelings of enmity and spite in the minds of the defendants." On the second issue he held that it appeared from the evidence generally that "the charge against the plaintiff was wholly groundless, and was preferred by them solely from motives of enmity, and for the satisfaction of a grudge." On the third issue he held that the plaintiff was a person of high rank and dignity, and was much humiliated and degraded by his arrest, and being put to bail, but that having regard to all the circumstances, 20,000 rupees damages would meet the justice of the case.

On the 7th March 1866, the High Court on appeal reversed the decree of the lower Court, and dismissed the plaintiff's suit with costs (1). The grounds on which the judgment of the Court proceeded were that, as to the appellant Bhugwant, he was merely an informant at the Police office at the request of the wounded men, and had said nothing of his own knowledge, and was not therefore liable to damages, and as to the other appellants, the Court doubted whether they also could properly be called prosecutors, or any thing more than informants to the Police, over whose action they had no power of control. Without however deciding this latter point, the Court held that the plaintiff had failed to make a case against them, even, supposing them to be prosecutors, inasmuch as he was bound to prove the innocence of the charge made, and had given no proof of it except "the order of the Magistrate by which he released the plaintiff for want of proof," which, in the opinion of

(1) 5 W. R., 134.

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the Court, did not prove the appellant's innocence, but only that he was not proved to be guilty; and, further, that even if such release did make for the plaintiff a *prima facie* case of innocence, it was binding on the Civil Court, or on the defendants, who were at liberty to plead and prove that the charges against the plaintiff were well founded, and that the defendants had so done, and the plaintiff had not produced any proof to rebut the defendants' evidence of his guilt. The judgment concluded in these terms :—

"Now, even if we be inclined to hold that the plaintiff and his son were not present as deposed to by these appellants, we are quite satisfied that the quarrel arose out of a claim to rents made by the plaintiff regarding certain lands alleged to be purchased by Mugneeram and others, which they asserted were lakhiraj, and that the lease of the village in which these lands were situated to the plaintiff's servant was a nominal transaction by the plaintiff while he kept himself in the background. We are not in a position to say that it was not the plaintiff who caused certain persons to go to the place of the riot; and that when by these acts the affray took place, the plaintiff was legally as well as morally responsible for those acts which led to the murder of the brother of Mugnee, and the wounding of several others. We admit the plaintiff had a remedy against these acts by prosecuting them for perjury in stating from motives of enmity and malice that he and his son were present, when they were not present at all, but he did not do this. Under all these circumstances we think a decree for any damages to the plaintiff is not proper, and we accordingly reverse the decision of the lower Court, and dismiss with costs the plaintiff's case, and decree this appeal with all costs."

From that decree the plaintiff appealed to Her Majesty in Council.

Mr. *Doyle* for the appellant.—The High Court were wholly wrong on the evidence as to Bhugwant being a mere informant put in motion by the others; for it is clear on the evidence that the Chowdhry respondents were a joint family, having the same interest in the subject of the suit, and at all times acting in concert, and all fully possessed of the actual facts of the whole case. Besides this, it is clear that Bhugwant was not a mere informant, but a prime mover, and joined with the other members

of his joint family as complainant, and that, if the charge against the appellant were untrue, it was so to Bhugwant's knowledge. The doubt thrown out as to the other appellants to the High Court being more than informants is opposed to the whole evidence, as they appear first to have sent Bhugwant to inform, and afterwards to have conducted the prosecution, and the defendant Seetaram had, after the discharge of the appellants repeated the slanders against the appellant in a petition to the High Court. The order of the Magistrate releasing the appellant is not of the doubtful character apparently imputed to it by the Division Bench, but is as express as such orders usually are. It may be admitted that it was open to the defendants to have pleaded and proved that he was guilty of the death of Kirtee Narain, and that the Civil Court was not in anywise concluded by the order of the Magistrate, if such an allegation had been made by the defendants, and proved to the satisfaction of the Court; but it is wholly erroneous to say that the defendants generally did so plead, inasmuch as only two of them, Mugneeram and Seetaram, ventured to repeat the charge against the plaintiff (appellant) in this suit, and no evidence whatever was offered by any of the defendants to justify such a charge. Under this state of facts, there was no evidence to rebut, and on the whole record it appears that there never was any *bonâ fide* ground for making so grave and unfounded a charge against the plaintiff. It is also to be observed that there is no evidence whatever to show that the lease to Sookhun was nominal, or that the appellant was the real though secret mover in the affray, and that the whole evidence points to the affray having been brought about by the lawless conduct of the Chowdhry respondents. It cannot be contended that the charges made by the respondents against the appellant were privileged, and the respondents were clearly bound to show the truth of them, on pain, in default of so doing, of having a decree given against them for damages. But even supposing the charges to be *primâ facie* privileged, they are taken out of the privilege by their manifest malice and falsehood. Independently however of the other evidence in the case, the order of the Magistrate discharging the appellant, when combined with the fact that no further criminal proceedings

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were taken against him, was, supposing the privileged character of the charges, sufficient *prima facie* proof of the appellant's innocence and the respondent's malice to have shifted on them the burthen of proving the truth or *bona fide* of the said charges which they have not even attempted to do.

The respondent did not appear.

Their LORDSHIPS delivered the following judgment :—

The material facts in this case may be very shortly stated.

It would appear that an affray took place between the partisans of the Chowdhrys, who were the defendants in the suit below, and of Baboo Gunnesh Dutt Singh, who was the plaintiff in the suit below. The cause of the affray and the circumstances attending it are involved in some obscurity, but their Lordships think it sufficiently appears that it originated in some attempt on the part of the partisans of the Chowdhrys to assert some real or pretended right which was resisted by the partisans of the Baboo Gunnesh Dutt Singh, and that in the course of that affray one of the Chowdhrys was killed, and some were wounded. It would appear that some of the Chowdhrys who were defendants in the suit below preferred a charge against Gunnesh Dutt Singh of having been accessory to this murder by inciting his partisans to violence, and Gunnesh Dutt Singh was brought before the Magistrate, who, however, upon hearing the case, dismissed it as against him for want of proof, and declined to commit him for trial. Thereupon Gunnesh Dutt Singh brought the present action.

This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion, with the High Court, that if it had been, strictly speaking, such an action, it could not have been maintained; for they agree with that Court that witnesses cannot be sued in a Civil Court for damages, in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justices that witnesses giving their evidence on oath in a Court

of Justice should not have before their eyes the fear of being harassed by suits for damages ; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury. But it appears to their Lordships that the suit of the plaintiff in the Court below, although called a suit for defamation of character, may be substantially supported (the question is one of substance rather than of form) as an action for a malicious prosecution ; and that being so, if we apply the principles of English law to the case, the burden of proof lying upon the plaintiff would be this,—he would have to prove in the first place that the defendants were the prosecutors of the criminal proceeding against him : next that they were actuated by malice, and further that their proceeding was without any reasonable or probable cause.

It appears to their Lordships that the issues of fact as stated do in substance raise the same questions which would be raised in an action for malicious prosecution in this country. We find the first issue of fact to be stated thus :—“ Is there any proof of the existence of any enmity between the litigant parties previous to the commencement of the criminal prosecution ? If it be in the affirmative then, whether or not the charge of complicity in the wilful murder of Kirttee Chowdhry, deceased preferred against the plaintiff by the defendants of the first party, simply originated from motives of humiliating the plaintiff, and was therefore entirely groundless.” The other issues of fact appear to their Lordships to substantially state the same questions which would come before a Judge and jury in an action for malicious prosecution in this country.

With respect to the proof of those issues, it appears to their Lordships that the plaintiff did substantially prove that the defendants, or at all events two of them, were the prosecutions on this occasion, although some little doubt is expressed upon that subject by the High Court. It appears to their Lordships also that some evidence was given by the plaintiff of malice on the part of the defendants. That evidence was not of a very clear or conclusive kind, but their Lordships are disposed to say that the case of the plaintiff on this issue was on the whole sufficiently made out.

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We now come to the third issue, namely, whether or not the plaintiff has given any proof of the want of reasonable and probable cause, or, as it is put in the statement of the points in the Court below, that the proceeding was altogether groundless. Their Lordships are of opinion that it rested upon the plaintiff to prove this, or at the least to give *prima facie* evidence of it calling for an answer. Their Lordships agree with this statement which they find in the judgment of the High Court:—
“ We find on the record of the case that the plaintiff has given no other proof of his innocence and of the falsehood of the statement of these four appellants except a copy of the order of the Magistrate by which that officer released the plaintiff for want of proof.” The plaintiff, it is true, gave in evidence certain depositions of the defendants; but those depositions, taken by themselves, were evidence of his guilt, not of his innocence. Then what evidence does he give to rebut them? He puts in the decision of the Magistrate, which was neither more nor less than this (although it is a good deal amplified by the Sudder Ameen in the Court below,) that the case is not proved against him in the opinion of the Magistrate. Their Lordships are of opinion that this decision was no evidence whatever against the defendants of the groundlessness of the prosecution. To hold that every person whom a Magistrate refuses to commit for trial is entitled to maintain an action for malicious prosecution, on the bare proof (without more) of the dismissal of the charge, might very injuriously affect the administration of the criminal law. It was in the power of the plaintiff himself to go into the witness-box and give evidence of his own innocence. He might have proved where he was and what he did at the time of the affray. He might have stated all the circumstances within his knowledge. But he declines to give evidence. Undoubtedly in this country, where a man sues for defamation of character, whether in the form of an action for a malicious prosecution or of libel or slander, it is expected that he who of all men is best able to give evidence of his own innocence should be put into the witness-box; and it is very rarely indeed that a plaintiff in any such suit obtains substantial damages if

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he does not give evidence or a good reason for not giving it. Not only does the plaintiff not give evidence himself, but although he calls witnesses for the purpose of showing malice on the part of the defendants, he calls none for the purpose of establishing his own innocence, or of disproving the charge against him.

Under these circumstances their Lordships concur with the judgment of the High Court, which appears to be substantially based upon the ground that in their opinion no proof had been given, not even *prima facie* proof, certainly not such as the plaintiff if he had been an entirely innocent man would have had it in his power to give, of the groundlessness of the charges preferred against him ; in other words, that there was no evidence of the part of the plaintiff of want of reasonable and proper cause for the institution of this prosecution.

Their Lordships do not think it necessary to follow the High Court in some observations which they have made as to the effect of the evidence upon the plaintiffs character ; a subject on which they give no opinion ; but on the ground already stated, namely, that they substantially agree with the finding of the High Court that no sufficient evidence was given on the part of the plaintiff of this being a malicious and a groundless prosecution, their Lordships will humbly advise Her Majesty that the decision of the High Court should be affirmed, and this appeal dismissed.

Appeal dismissed.

Agent for the appellant : Mr. Wilson.

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BAROO
GUNNESH
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v.
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CHOWDHAY.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Birch.

1873
May 22.

GOLAB CHAND BABOO (DEFENDANT) v. SREEMUTTY PROSONNO
COOMARY DABEE AND ANOTHER (PLAINTIFFS).*

Sebait—Idol—Decree against Sebait—Successor in Sebaitship—Res-judicata

See also
14 B.L.R. 451

A decree obtained *bona fide* against the *sebait* of an idol is binding on his successor.

THIS was a suit to have certain *debutter* properties released from an attachment made in execution of certain decrees obtained by the defendant against the plaintiffs, to have the said decrees set aside on the ground that they had been fraudulently obtained, and to have set aside a certain summary order passed in reference to the execution of the said decrees. The plaint was filed on 20th September 1871. The plaintiffs alleged that the properties in suit among others were granted on rent-free tenure for the purpose of the worship of the idol Sri Sri Issur Luckhee Narain Thakoor, established by Bheekun Lal Thakoor, and for the purpose of distributing alms; that at first Bheekun Lal Thakoor, and after him by the approval of the Sudder Board, Gopal Pershad Baboo, were appointed *sebait*; that after their death Kishen Pershad Surma, *alias* Rajah Baboo, was appointed *sebait* in their place; that the said Rajah Baboo was addicted to sensual enjoyments and incurred debts to defray his extravagant expenses, whereupon the defendant, on the fraudulent allegation of such expenses being necessary acts connected with the worship of the idol, caused bonds to be executed by Rajah Baboo on false pretences, and, having lent him certain sums of money, assisted him in his acts of extravagance; that on account of those debts the defendant improperly obtained two decrees on 27th February 1852 and 25th July 1854, with directions that the decrees should be

* Regular Appeal, No. 117 of 1872, from a decree of the Officiating Subordinate Judge of Dacca, dated the 10th April 1872.

realized from the *debutter* properties ; that by virtue of the said decrees, the defendant had been appropriating the profits arising from the *debutter* properties through the manager appointed after attachment in execution of the decrees, and was thereby throwing obstacles in the way of the accomplishment of the objects for which the grant was made ; that the plaintiffs were appointed *sebait*s of the said idol on 20th January 1868 by order of the Sudder Board, and became aware of the above-mentioned circumstances after the death of the said Rajah Baboo ; that the plaintiffs had put forward an objection for the release of the *debutter* properties, on the ground that those properties were not liable for the debts incurred by Rajah Baboo ; that there was no necessity for such expenses, and that the *sebait* was not competent to spend any amount of money larger than the amount of income by raising loans and making the *debutter* properties liable for the same, more especially as the acts done by the said Rajah baboo ended with the determination of the office of *sebait* which he held, but the said objection was rejected by the Court on 29th June 1871, on the ground that the matter could not be settled in the summary department ; and that they consequently brought the present suit praying for an order directing the exemption of the *debutter* properties from liability under the decrees, and the discharge of the manager appointed after attachment.

The defendant in his written statement stated that in the suits in which the decrees had been obtained, the plaintiffs' predecessor Kishen Pershad Surma, *alias* Rajah Baboo, had among other points raised the objection that the money covered by the bond had not been expended for the purpose of the worship of the idol, but such objection had been disallowed, and that the plaintiffs who were representatives of the said Rajah Baboo having brought the present suit on the same basis on which the said objection had been preferred, *viz.*, that the said money was not expended for the purpose of the worship of the idol, the suit was barred under s. 2 of Act VIII of 1859 ; that the plaintiffs, although they had been *sebait*s for more than three years, had done nothing towards getting rid of the decrees ; that, inasmuch as the plaintiffs' objection raised in the

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execution-case had been disallowed, a regular civil suit to set aside the said order was not maintainable; that the suit was barred by the law of limitation; that the property was not *debutter* property; and that the bonds in which the decrees had been obtained were executed *bonâ fide*, and the amount covered by the decrees had been taken and expended for the performance of the worship of the idol.

At the trial before the Officiating Subordinate Judge, the following issues (among others) were raised :—

“ Whether or not the provisions of s. 2, Act VIII of 1859, are publicable to this suit ?

Whether or not the decrees in question are collusive? and whether or not, for the satisfaction of the said decrees, the properties in dispute can be held liable in any way ?”

The Judge held that s. 2 of Act VIII of 1859 did not bar the suit; and that the decrees were collusive, and the properties in suit were not liable to attachment under the decrees. He therefore gave a decree in favor of the plaintiffs.

The defendant appealed to the High Court.

The fourth ground of appeal was that, “ in order to nullify the decrees, the plaintiffs were bound to prove that the decrees themselves were tainted with fraud, and were mere colorable proceedings, and not adjudications in real suits *bonâ fide* brought and really contested.”

Mr. Woodroffe (Baboos *Mohes Chunder Chowdhry* and *Kally-kissen Sein* with him) for the appellant.

The *Advocate-General* offg. (Mr. Paul,) (Baboos *Romesh Chunder Mitter* and *Doorgamohun Doss* with him) for the respondents.

Mr. Woodroffe contended that the question of the liability of the *debutter* property had been decided in the two suits in which the decrees now sought to be set aside were obtained, in favor of the present defendant, and the same question could not now be raised; Act VIII of 1859, s. 2.—*Kissno-nund Ashrom Dundy v. Nursingh Doss Byragee* (1), *Juggut*

Ohunder Sein v. Kishnanund (1), and *Maharanees Shibessuree Debia v. Mothooranath Acharjee* (2). A decree against a *sebait* binds his successors, and is not a decree against the individual personally—*Maharanees Shibessuree Debia v. Mothooranath Acharjee* (2).

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The questions whether *debutter* property was liable to alienation; and whether this suit was maintainable under s. 11, Act XXIII of 1861, or whether the proceedings ought not to have been by way of appeal, were also argued.

The respondents were called upon to support the judgment of the Court below with reference to the fourth ground of appeal.

Baboo *Romesh Chunder Mitter* contended that the evidence supported the finding of the lower Court that the decrees had been fraudulently obtained; that the decrees were not binding on the property, but were personal decrees against the Rajah himself, and not as *sebait* of the idol; and that a decree against a *sebait* would not be absolutely binding on his successors, but at most was only *prima facie* evidence against them. The property is *debutter* property, and is not liable to attachment; it cannot be alienated—*Jewun Dass Sahoo v. Shah Kubeerooddeen* (3). These decrees do not bind the plaintiffs—*Boykumtnath Chatterjee v. Ameeroonissa Khatoon* (4); see also *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (5). Notwithstanding the decrees the plaintiffs are entitled to show that the transactions which preceded the decrees were of such a nature that the plaintiffs are not bound by them, that is, were collusive and fraudulent. The case of *Maharanees Shibessuree Debia v. Mothooranath Acharjee* (2) is distinguishable.

The *Advocate-General* on the same side (6).—A *sebait* succeeding to the charge of an idol has a right to question a decree made

(1) 2 Sel. Rep., 126

(5) 10 Moore's I. A., 454.

(2) 13 Moore's I. A., 270.

(6) He was not in Court at the

(3) 2 Moore's I. A., 390; see 421, beginning of the argument for the respondents.

422,

(4) 2 W. R., 191; see 195.

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against his predecessor fraudulently. Even if the decree be not fraudulent, he has a right to follow the property of the idol, and to put to proof of title any one who has it and claims a right to it. A *sebit* of an idol has no estate; the property is that of the idol, and the *sebit* is merely manager of it: see *Lalla Bunseedhur v. Koonwur Bindesree Dutt Singh* (1), and this without admitting the analogy to the relation of guardian and ward. The evidence shows no necessity for the expenses of the Rajah, which if it existed ought to be very clearly shown. A *sebit* has no power of alienation; the plaintiffs would be entitled to have any conveyances prior to their tenure of office set aside—*Jewun Doss Sahoo v. Shak Kubeeroodeen* (2). Where a person has no power to create a charge, the court will not create one for him. At any rate an alienation or charge could only be made to such an extent as not to interfere with the worship and keeping up of the idol—*Juggernath Roy Chowdhry v. Kishen Pershad Surma* (3), *Rumonee Debia v. Baluck Doss Mohunt* (4)

(1) 1Q Moore's I. A., 454.

(2) 2 Moor's I. A., 390.

(3) 7 W. R., 266.

(4) *Before Mr. Justices Phear and Mr. Justice Mitter.*
The 4th July 1870.

RUMONEE DEBIA AND ANOTHER
(PLAINTIFFS) v. BALUCK DOSS MO-
HUNT (DEFENDANT)*

Sebit—Debutter Property—Alienation.

Mr. Montrieux (with him Baboos Sree Nath Dass, Romesh Chunder Mitter and Rajendro Nath Bose) for the appellants.

Baboos Onoocool Chunder Mookerjee and Ukhil Chunder Sen for the respondent.

THE judgment of the Court was delivered by

PHEAR, J.—After the best consideration which we can give to this case,

we are unable to resist the conclusion that the property which is the subject of suit is in truth *debutter* property dedicated to the idol. It is even proved we may say to be so from the evidence on which the plaintiff himself relies.

This being the case, whatever remedies the plaintiff may have against the *sebit* for fraud or misrepresentation we think that he cannot claim the land itself under the mortgage-deed of the defendant which was altogether *ultra vires*.

We are, therefore, of opinion that the decision of the lower Court upon this point is right, but we think that the defendant is bound to pay the plaintiff the costs which he has incurred in this Court and in the Court below.

The plaintiffs' suit is dismissed, but the defendant must pay the plaintiffs' costs in both Courts.

* Regular Appeal, No. 274 of 1869, from a decree of the Subordinate Judge of Chittagong, dated the 6th September 1869.

and *Goluck Chunder Bose v. Rughoonath Sree Chunder Roy* (1).

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If a *sebit* cannot alienate the property, can the same effect be

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(1) Before Mr. Justice Kemp and Mr.
Justice Glover.

The 7th March 1872.

GOLUCK CHUNDLER BOSE (ONE OF THE
DEPENDANTS) v. RUGHOONATH
SREECHUNDER ROY PLAINTIFF.*

Sebit—Debutter Property—Alienation.

Baboos *Obhoy Churn Bose* and
Umbica Churn Banerjee for the
appellant.

Baboos *Chunder Madhub Ghose*
and *Nil Madhub Sen* for the respondent.

The judgment of the Court was
delivered by.

KEMP, J.—We do not think it
necessary in these cases to call upon
the pleader for the respondent. The
case No. 943 was taken up first, and
it is admitted that one judgment will
govern both appeals.

This case was remanded by this
Court to the Judge of Cuttack to find,
1st, whether the plaintiff's father had
resigned the *sebitship* of these
endowed lands to the plaintiff; 2ndly,
whether the plaintiff had proved
possession, as he came into Court for
confirmation of his possession; and,
3rdly, whether he was the *sebit* of the
thatur or not. The judge has very
carefully considered the case, and he
found that the plaintiff's father did
relinquish the *sebitship* and the
endowed lands to the plaintiff; that
the plaintiff was in possession; and
that the possession of Gobind Churn,
the judgment-debtor of the special

appellant, was a mere *benami* possession.

The grounds taken in special appeal
are, 1st, that the relinquishment to
the plaintiff by his father is found
only on the written statement of the
father; that the written statement of
one defendant is no evidence as against
a co-defendant and, therefore, there
being no other evidence but that
written statement, that point has not
been established; 2ndly, that both
Courts having found that the holding
of Gobind Churn, the special appel-
lant's judgment-debtor, was a *benami*
one, the plaintiff cannot set up his
father's fraud.

On the first point, it is very clear
that there is evidence independent of
the written statement of the plaintiff's
father, and on that evidence the lower
Court, after carefully considering the
whole case, has come to the deli-
berate conclusion that the plaintiff's
father did relinquish the *sebitship*
and the endowed lands to the plaintiff.

On the second point, it appears that
the whole of the property was en-
dowed property. It is now therefore
such a property as the plaintiff's
father could sell burdened with a
trust. It is resumed rent-free *debutter*
lands, lands endowed, and the proceeds
of which are appropriated to the service
of the idol. The plaintiff succeeds
his father as trustee of that property,
and he is not in any way bound by
any acts of his father done in fraud
of the trust.

The appeal must, therefore, be
dismissed with costs.

* Special Appeals, Nos. 743 and 943 of 1871, from the decrees of the Judge of Cuttack, dated the 15th March 1871, affirming the decrees of the Munsif of that district dated the 6th July 1870.

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obtained by a personal decree against him, that is, can that be done indirectly which he has no power to do directly? The plaintiffs do not claim through the Rajah against whom the decrees were made; to estop them it is necessary that they should. There ought to have been an inquiry as to whether the decrees had been satisfied.

Mr. *Woodroffe* in reply (was called on only on the question of whether there ought to be an enquiry as to the satisfaction of the debt out of the income of the *debutter* property.) An inquiry is not asked for, nor is any suggestion that one is necessary made in the case. The evidence does not show the decrees are discharged.

The judgment of the Court was delivered by

MARKBY, J. (who, after stating the facts, continued:)—Now, before going to the judgment of the Court, I will state shortly what the two previous suits were, and what were the judgments passed in them. The first was a suit brought by Golab Chand Baboo, who is the defendant in this suit, against Rajah Baboo, who is described as an inhabitant of Lakhee Bazar, and Jotton Coomaree Dabee, mother and guardian of Gobordhun Baboo, a minor, and several other persons. We have not before us the record of that suit in the first Court, but only the judgment of the Appellate Court which however sets out pretty fully what the nature of the case was. It appears that the suit was brought upon what is called a *kabinnama* or deed of mortgage and a *tamassuk* on the allegation that a loan of Co.'s Rs. 4,000 was taken for the purpose of repairing the *dalan*, &c. of the idol Lukhee Narain. The defence set up was in the first place that the money had been repaid. But it was stated that the main dispute between the parties was whether the money could be recovered from the property pledged or not. Now the question as to whether the money had been paid or not was fully decided by the Principal Sudder Ameen in favor of the plaintiff, but when he came to decide the other question as to whether the money could be recovered from the property mortgaged or not, he said that this point could be settled in the execution department. The plaintiff Golab Chand, who is now

defendant in the present suit, was naturally dissatisfied with that decision, an appeal and appeal to the Judge complaining that the decision of the Principal Sudder Ameen had left the main question between the parties undetermined. He stated very properly that the points to be decided were whether his allegation that the money was borrowed for the purpose of repairing the *dalan* of the idol was true? and if that was true, whether he was entitled to recover the money from the *debutter* property? In the appeal of the respondent, joint issue, upon those two questions which were raised in various forms in the issues drawn up by the Appellate Court. Then the effect of the judgment of the Court is this:—The Judge points out that Rs. 4,000 was borrowed upon a *kabinnama* and also upon a bond, and that both the documents state that the money was borrowed for purposes connected with the temple. The Judge then having taken the opinion of the pundit of the Court comes to the conclusion that, inasmuch as there was no provision made in the grant of the *debutter* land authorizing the sale or mortgage thereof, the *kabinama* could not be supported. The Judge then goes on to say with regard to the bond that it has been proved that the money borrowed was expended for the purposes therein stated, that is to say, for the purposes of repairing the *dalan* of the idol; and that notwithstanding the objection of the then defendant Rajah Baboo and the other objectors that the property cannot be pledged for a debt, and therefore its produce cannot be attached on account of a debt contracted by the *sebait*, the *debutter* property is liable for that bond debt; and the Judge gives a decree directing that the money should be realized from the proceeds of the *debutter* land.

The second suit was brought by the same Golab Chand Baboo, the present defendant, against Kishen Pershad Surma, *alias* Rajah Baboo, whom he described as *sebait* of the idol Luckhee Narain Thakoor. There we have a full abstract of the plaint which shows that the plaintiff in that case alleged that the money was borrowed by the then defendant Rajah Baboo as *sebait* of the idol for the purpose of certain ceremonies connected with the worship of the idol, and for carrying on the necessary expenses of a certain litigation which was then going

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on in Court, and he prayed that the amount of the claim with interest thereon be awarded to him from the *debutter* property. The substance of the answer is that the defendant had not taken the money for the purposes of the idol worship, or for the costs of the litigation, that there was ample money out of the income of the idol to pay for the daily worship and other festivals, and also for all other purposes connected with the temple, and that the real truth was that the defendant had certain private transactions with the plaintiff for which the money was received. Issues were raised with reference to the allegations on both sides, and the Judge found that the money was borrowed by the defendant to defray the costs of the suit of *debutter*, &c., and it was declared that, if the defendant failed to pay the amount personally, it should be realized from the proceeds of the *debutter* mahal. Nothing certainly upon the face of it can be clearer than those proceedings are that the very point which is now raised in this case was raised by Rajah Baboo himself in both the former suits and also in the first suit by persons who, as far as we know, were quite independent of Rajah Baboo.

Now I find it a little difficult to understand how the Subordinate Judge has dealt with these decrees. He says, and perhaps says rightly, that, inasmuch as there is at any rate an allegation in the plaint that the decrees are fraudulent, the suit cannot be treated as barred by s. 2, Act VIII of 1859. But of course it was obviously necessary for him to go on and determine whether or not they were fraudulent, and I am not certain whether he means to say that there was any fraud in the mode in which those decrees were obtained, or whether he assumes that that was so, because in his opinion the transactions which led up to them were fraudulent. The appellant, in drawing the petition of appeal, however seems to presume that the question of fraud in obtaining the decrees has not been disposed of by the Subordinate Judge. In his fourth ground of appeal, he says (*reads*) (1). Now that is by no means the only question in this case disposed of by the Subordinate Judge, and raised for our consideration in this appeal. One question

(1) See *ante*, p. 334.

which the appellant was desirous to contend was whether or not these lands were *debutter* ; and there were also other questions which would have to be considered where it necessary to go into the whole appeal. But we were of opinion that the fourth ground of appeal was well-founded in law, and if it could not be displaced, it would be a complete answer to the whole suit. We therefore thought that it was a convenient course to call upon the other side to support the judgment of the Subordinate Judge upon that point. In doing so, Baboo Romesh Chunder Mitter, who argued the case in the first instance on behalf of the respondent, raised three very clear contentions. He contended in the first place, and no doubt he had a right to contend, that the Subordinate Judge had found, and the evidence established, that those decrees were fraudulently obtained ; secondly, he argued that the decrees were not in such a form as to be binding on any person but Rajah Baboo himself ; and, thirdly, that, independently of any question of former decree, a decree against a *sebit* could be no more than *prima facie* evidence against his successor.

Now, with regard to the question of fraud, it would of course be a great help to us to have a clear finding by the Subordinate Judge upon that point. The real question, however, which we have to consider is as to whether or no the evidence supports that allegation. (The learned Judge went through the evidence as to the decrees being fraudulent and continued) :—I feel bound to say that, even if the Subordinate Judge did think the decrees were fraudulently obtained, I find no sufficient evidence on the record to justify him in coming to that conclusion. I think, therefore, that upon that question we ought to hold that the decrees were obtained *bona fide* ; that the parties were really at arm's length, and that Rajah Baboo was doing his best to get those suits dismissed. Throughout this case we have not heard a single word that could suggest that the other persons who were defendants in the first case had been implicated in any fraud with Rajah Baboo, and there is no direct evidence whatever of any fraud in connection with the second decree.

Then I pass on to the next point. It has been argued (and

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this objection will only apply to the first of those cases) that Rajah Baboo had not been, as far as we have any evidence before us, described in the plaint as *sebait* of the idol, and that therefore that decree is not binding upon the *sebait*s, his successors. But it is perfectly clear, from the abstract of the claim given in the decree, that Rajah Baboo was sought to be made liable as the *sebait* of the idol, and it is also clear from the abstract of the answer that he had defended that suit as *sebait*. No doubt, as a matter of form, he ought to have been described in the plaint as *sebait*; but I do not think that that alone would be sufficient ground for saying that the decree is not binding upon any person except Rajah Baboo himself.

The last point is that which has been most strongly argued, namely, whether or not the decree against a person as *sebait* of the idol is binding on his successor. Now upon that point we have the authority of a Division Bench of this Court, *Kismonund Ashrom Dundy v. Nursingh Doss Byragee* (1), and it has not been attempted by either of the Counsel for the respondent to distinguish that case or the case of *Juggut Chunder Sein v. Kishnanund* (2) on which that case was founded, and which was also cited by Mr. Woodroffe. Those cases establish that a decree obtained honestly against a *sebait* is binding on his successor, and we see no reason to doubt the correctness of those decisions. A great deal of argument has been imported in this matter as to whether a *sebait* could alienate *debutter* property, or how far he would be barred by limitation, or whether an arrangement made by a person in charge of such property in reference to the property would be binding on his successor. All that as it appears to me has nothing to do with the present case. The question which we have now to consider is whether the decrees which were obtained against Rajah Baboo are binding upon the present plaintiffs, and in deciding that point, we have no hesitation in following the decision of Norman and Kemp, JJ., in *Kismonund Ashrom Dundy v. Nursingh Doss Byragee* (1), unless there is any superior authority to the contrary. But the decisions of the Privy Council which have been

(1) Mar. Rep., 485.

(2) 2 Sel. Rep., 126.

referred to do not appear to me to have any bearing upon that question. The decision in *Jewun Doss Sahoo v. Shah Kabeer-oodeen* (1) was actually before Norman, J., when he delivered his judgment, and what the question there was appears in page 421, namely, whether a *matwali* has a right to alienate or transfer *wukf* property by gift or otherwise. And no doubt this case is an authority that he cannot do so; but it has nothing to do with the question which we have to consider. Then with regard to the case of *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (2), if the circumstances of that case are looked at, it is plain that it has no bearing upon this case. What is binding is a decree of Court properly obtained, and not a mere agreement which the parties have entered into for their own purposes and embodied in a decree, drawn up by consent. In that case what happened was that a previous arrangement having been made between the parties for their own purposes, the suit was commenced on one day, and on the following day a compromise was made and a decree given, and Lord Chelmsford in dealing with it says:—"You get a cognovit for Rs. 54,000 on an advance of Rs. 26,986, borrowed according to your argument to save the estate, but under that cognovit or confession of judgment, you force a sale yourself and actually buy in the minor's estate: can that stand?" The use of the word "cognovit" shows how the Privy Council looked at it; and of course that is not an instance of a decree for the purposes of the question which we are now considering. The only other case quoted is *Maharanees Shibessuree Debia v. Mothooranath Acharjee* (3). There is nothing in that case very precisely bearing upon the present question. I think however that it is quite enough to cite one passage in it. The Privy Council say in giving judgment that, "if the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata*, binding on the parties and those claiming under them." It seems to me that the Privy Council would never

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(1) 2 Moore's I. A., 392.

(3) 13 Moore's I. A., 270, see 275.

(2) 10 Moore's I. A., 454, see 459.

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have used that language had they intended to intimate an opinion adverse to the opinion expressed by Norman and Kemp, JJ., in the case I have referred to.

This being the view that we take of the case, all the other questions which have been taken in this appeal, and which were raised in the Court below, are questions upon which we need not express any opinion whatever. We confine our judgment entirely to the objection taken in the fourth ground of appeal, and hold that the decrees which the plaintiffs seek to set aside, were fairly and honestly obtained as far as appears on the evidence before us, and that therefore they are binding upon the parties, and that the proceedings taken with reference to those decrees are also binding upon them.

There were two other questions raised by the Advocate-General in this case. One was that the order for attachment and appointment of a manager which had been made in execution of those decrees was not authorized by Act VIII of 1859. But no such point was raised in the Court below, or in this Court by cross-appeal, and I think it is sufficient to say that nothing has been shown to us upon which we can say that there was anything wrong in the proceedings that have been taken. The other point was that there ought to be an enquiry now to ascertain whether the amount covered by those decrees has been realized from the profits of the property through the manager. We think it is unnecessary to consider this point. It is quite sufficient to say that no such prayer has been inserted in the plaint. If the plaintiffs wish to have an enquiry made upon this point, it must be in a proceeding properly framed for that purpose.

The result is that the decree of the lower Court ought to be reversed, and the plaintiffs' suit dismissed. The appellant is entitled to his costs both in this Court and in the lower Court.

Appeal allowed.

Before Mr. Justice Kemp and Mr. Justice Pontifex.

RUTTEE SIRDAR AND OTHERS (DEFENDANTS) v. SAJOO
PORAMANICK (PLAINTIFF).*

1873
July 4.

Contribution, Suit for—Wrong-doers—Costs—Damages.

The plaintiff and defendants jointly opposed and prevented the ameen of a zemindar from measuring certain lands. The zemindar thereupon brought a suit against them to have his right to measure declared and obtained a joint decree with costs. In execution of the decree for costs, the property of the plaintiff was attached, and he solely paid the whole amount due for costs. The plaintiff now sued the defendants for contribution :

Held, that such a suit would lie.

The admitted facts in this case showed that the ameen of a zemindar, named Ram Tono Ghose, was prevented by the plaintiff and defendants from measuring certain lands forming a part of the zemindari. Thereupon the zemindar instituted a suit against the plaintiff and defendants to have his right to measure the lands of his estate declared, and obtained a joint decree declaring his right thereto. The decree also ordered the defendants in that case to pay the zemindar the costs of suit. On executing this decree to recover his costs, it appeared that the zemindar attached the property of the plaintiff and recovered from him the whole amount.

The plaintiff then brought this suit for contribution, after deducting from the total amount paid by him in execution, the share for which he, the plaintiff, was liable. The defence was, 1st, that the Civil Court had no jurisdiction as the suit was re-triable by a Small Cause Court ; 2nd, that the decision in *Sreeputty Roy v. Loharam Roy* (1) applied ; and, lastly, that the defendants had paid Rs. 150 to the plaintiff.

The first Court was of opinion that the suit was cognizable by the Civil Court, but that the principle of the case mentioned applied and dismissed the suit.

* Special Appeal, No. 1659 of 1872, from a decree of the Subordinate Judge of Rajshahye, dated the 25th June 1872, reversing a decree of the Munsif of that district, dated the 3rd April 1871.

(1) Reference from the Small Cause Court at Kishnaghur, 15th April 1869.

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On appeal, the Subordinate Judge found on the evidence that the plaintiff and defendants equally opposed the ameen of the zemindar in the measurement of the lands, that the ruling in this case mentioned did not apply, and that the plea of the defendants that they had paid Rs. 150 to the plaintiff was not established.

The defendants appealed to the High Court.

Baboo *Goopee Nath Mookerjee* for the appellants :—The plaintiff and defendants were engaged in committing a wrongful act, namely, that of opposing the zemindar's ameen in measuring, and a suit for contribution by one wrong-doer against another will not lie. The principle of *Sreeputty Roy v. Loharam Roy* (1) applies.

No one appeared for the respondents.

The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts, continued) :—The ruling to be found in the case of *Sreeputty Roy v. Loharam Roy* (1) refers to a case of damages, the present case not being one for damages at all but for costs. In that case the defendants had trespassed upon the lands of the plaintiff and erected a *bandal* thereon for the purpose of catching fish within the limits of the plaintiff's estate. Even in that case, which was one of trespass, the Chief Justice who delivered the Judgment of the Full Bench says:—"The Court cannot say whether the plaintiff is entitled to contribution or not, all that we say is that the plaintiff was not necessarily precluded from recovering contribution merely because the damages for which the decree was given, were caused by a wrong, in the legal sense of the word, done to the plaintiff. If the Judge had jurisdiction in the case, we should inform him that he ought to try the case upon the merits and to ascertain whether, having reference to the circumstances under which the trespass was committed the parts which the defendants respectively took in it, and the benefits, if any, which they respectively derived from it, they ought to contribute

(1) Reference from the Small Cause Court at Kishnaghur, 15th April 1867.

any and what portions of the damages recovered against them."

The Chief Justice then goes on to say :—" If they were all jointly concerned in committing an act which they knew to be illegal, the plaintiff is not entitled to contribution."

In the case now before the Court, the parties were only jointly concerned in the act of opposing an ameen in making a measurement, and the decree being a joint one, the presumption is that the defendants in the original decree were jointly liable. The lower Appellate Court has found on the evidence that the defendants in this case joined the plaintiff in opposing the zemindar.

We dismiss the appeal but without costs as no one appears for the respondent.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Jackson. Mr. Justice Phear, Mr. Justice Ainslie, and Mr. Justice Pontifex.

QUEEN v. SABED ALI AND OTHERS.*

Penal Code (Act XLV of 1860), s. 149, & s. 300, exc. 2—Unlawful Assembly—Common Object—Murder.

1873
April 21.

One member of an unlawful assembly, whose common object was to eject certain persons from a piece of land the title to which was disputed, fired at and killed one of such persons. *Held* (by COUCH, C.J., and JACKSON, PHEAR, and PONTIFEX, JJ.) that, the act being sudden and unpremeditated, the other members of the assembly were not guilty of the offence of murder under s. 149 of the Penal Code (1), but of rioting armed with a deadly weapon under s. 148. AINSLIE, J., dissented.

SABED ALI, Ain Ali *alias* Anoo Ali, Kaloo Sikdar, and Gundhurbo Khan were convicted by the Sessions Court of

* Criminal Appeal, No. 979 of 1873, from an order of the Sessions Judge of Backergunge.

(1) *Act XLV of 1860, s. 149.*— be committed in the prosecution of "If an offence is committed by any that object, every person who, at the member of an unlawful assembly, in time of the committing of that prosecution of the common object of offence, is a member of the same that assembly, or such as the members assembly, is guilty of that offence." of that assembly knew to be likely to

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Backergunge, constituted of a Judge and two Assessors, of the offence of murder under the provisions of s. 149 of the Indian Penal Code, and sentenced each to the punishment of transportation for life.

The material facts of the case were stated thus in the judgment of the Sessions Judge. He says:—

"I agree with the Assessors that it is clearly proved that the prisoners and others attacked Fuckeer Buksh whilst he was ploughing his own land in company with his three kinsmen and co-sharers. Samed Ali, Sharef Ali, and Kadez Ali, and that in the struggle Tareboolah, one of the attacking party (but not, it may be observed. one of the prisoners), fired a gun loaded with small shot killing Samed Ali on the spot, and wounding Sharef Ali on the back. All the prisoners therefore as taking part in the riot, and having the same object in view, namely, to drive Fuckeer Buksh off the land, are in the eye of the law guilty of murder . . . It seems to me therefore quite clear, first, that the land was in the possession of Fuckeer Buksh, and that he and his companions were ploughing it when they were attacked; and, second, that the reason assigned by Fuckeer Buksh for the attack is the natural and probable one, namely, that Sabed Ali, having paid up the full rent, was determined not to allow Fuckeer Buksh to hold and cultivate his land until he made good his quota. 'I cannot doubt that the unexpected resistance offered by Samed Ali and Sharef Ali, but more specially by the former who was a young and powerful fellow, and who snatched a *latti* from the hands of one of his adversaries and laid about vigorously with it, led to the sudden and probably at first unintended use of the gun by Tareboolah. Finding his party driven back by the two men Samed Ali and Sharef Ali, for the two old men Fuckeer Buksh and Kadez Ali were not of much account (though Fuckeer Buksh's right hand shows that he was considerable knocked about). Tareboolah raised his gun and fired, striking the advancing Samed Ali full in the chest, Sharef Ali saw the impending blow, and just had time to turn and fly, and so received a considerable portion of the charge in his back:

"I hold it therefore proved on the evidence that all the prisoners are guilty of the offence laid to their charge.

"The Court concurring with the Assessors finds that Sabed Ali, Ain Ali *alias* Anoo Ali, Kaloo Sikdar, and Gundhurbo Khan are guilty of the offence specified in the charge, namely, that they being members of an unlawful assembly in the prosecution of the common object of

which, namely, to enforce a supposed right to a certain piece of land, one Tareboolah, a member of the said unlawful assembly, committed murder by causing the death of one Somed Ali, have committed the offence of murder, and have thereby committed an offence, under s. 149 of the Indian Penal Code, punishable under s. 302 of the said Code, and the Court directs that the said Sabed Ali, Ain Ali *alias* Anoo Ali, Kaloo Sikdar, and Gundhurbo Khan, be each punished with transportation for life from this date."

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The prisoners appealed to the High Court.

The appeal came on for hearing before a Division Bench (Phear and Ainslie, JJ.) when in consequence of a difference of opinion, between their Lordships, the record was by the order of Phear J. submitted to the Chief Justice for the appointment of a third Judge. The Chief Justice under the provisions of the Criminal Procedure Code (Act X of 1872) s. 271 added three Judges to the Judges of the Division Court and the appeal was then heard by five Judges.

Baboos *Ambica Churn Bose* and *Rojoneenath Bose* for the appellants contended that the act was done in self-defence. It does not amount to murder. The Judge finds that there was no intention to use the gun. Consequently there was no intention to kill Somed. The act would come under exception 2, s. 300 of the Indian Penal Code, as it was done in defence of private property.

No one appeared for the Crown.

The following judgments were delivered :—

AINSLIE, J. (1)—In this case there was a dispute about a piece of land between Fuckeer Ali and Sabed Ali, which ended in a riot, in the course of which a man named Tareboolah, one of the party of the prisoners, fired a gun and killed Somed Ali. It has been found by the Judge that Tareboolah was a member of an unlawful assembly, of which the prisoners whose appeal is now before the Court were also members; and as to Sabed Ali it is also shown by the evidence that he directly invoked the aid of the party among whom was this Tareboolah armed with a gun. Tareboolah himself is not under trial; but the Judge, in order to apply the provisions of s. 149 of the Penal Code to the other prisoners, has considered the nature of the

(1) This judgment was read by the Chief Justice, Ainslie, J., being absent on leave.

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offence committed by Tareboolah and has found that it was murder, and in that finding I think he was clearly right. Under s. 149 he has convicted the present appellants of that same offence, and sentenced them to transportation for life. If they are rightly convicted under that section, the Court can pass no milder sentence; if that punishment is too severe, it can be reduced by the Local Government; but the only question just now before us is whether the conviction and sentence are according to law.

S. 149 runs as follows :—(*reads*). The last words are very stringent; if the section applies, the Court is bound to convict of the particular offence. Tareboolah committed the offence of murder; he was at the time of the murder a member of an unlawful assembly; the accused were also members of that unlawful assembly, at the time when the murder was committed; then the questions are, firstly, was the murder committed in prosecution of the common object of the assembly? and secondly, did the accused know that such an offence was likely to be committed?

As to the first I find it impossible to say that the murder which occurred was not committed in prosecution of the common object. It seems to me that the common object was not merely to eject the party of Fuckæer Ali from the disputed field, but that it was to do so by show of force, and, if necessary, by actual force. I do not think it possible on the evidence to say that the common object was limited to the ejectment, and that the use of force was not deliberately contemplated; nor do I think that we may say that force was only a means to an end, and that the ultimate object of obtaining possession of the field was the only common object of the party; it was clearly the deliberate intention of the unlawful assembly to use certain means to obtain a certain end, and I am therefore unable to come to any other conclusion than that the common object was compounded both of the use of the means and the attainment of the end. The evidence distinctly establishes that a number of men proceeded to the spot to eject Fuckæer Ali; that they or several of them were armed with *lattis*, and that one who was found among the party when the riot commenced, though we do not know when he joined it, was armed with a gnu; and that, on resistance being offered they proceeded to use violence; and judging of their intentions

from their actions, I cannot help finding that it was from the first their intention to overpower by force any resistance to the occupation of the field. This violence actually extended to the causing of the death of Somed Ali under circumstances which undoubtedly made the homicide murder on the part of Tareb. oolah : on this point I believe we are all agreed.

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I then come to my second question, was th is murder an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of their common object, such common object being the use of force, if necessary, to obtain possession of the land? I take it that, when the law speaks of a man knowing the probable result of his acts, it meant that an ordinary man bringing his reason to bear on the matter must know that such result will probably ensue from his act. If *A* intentionally and without lawful excuse fires a bullet into *B*'s body, he, if not of unsound mind, must know that death his the probable result, though he does not know that death will actually result. *B* may recover, but, if he does not recover, the causing of death is the intentional act of *A*. It is no excuse for *A* to say that he had not brought his mind to bear on the consequences of his act; that he had not thought of the matter, and therefore did not know at the time of committing the act what the probable result would be. If the act done is such that a reasonable man who chooses to consider it must know the probable result, the law will presume the exercise of reason and the consequent knowledge.

A number of men armed with clubs go out to enforce a right or supposed right by the use of those clubs; resistance is offered and it becomes a question whether they, instead of overpowering their adversaries, are not overpowered themselves, is it likely that under such circumstances they will measure their blows? Yet clearly they have no right of private defence, and, if they cause hurt in any degree, they must take the consequences. It cannot be said that a man who attacks another with a weapon calculated to inflict serious injury, though without intention of taking life, and finds unexpected resistance, is justified by that resistance in taking life. It may not have been his intention at first to do so, but it comes to be his intention, or at any rate he

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under the pressure of the position into which he has forced himself, comes to commit an act so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death, without any excuse for incurring the risk of causing such injury, and by that act he commits murder. As it is with the individual, so also is it with the members of an unlawful assembly collected with the common object of gaining a certain end by violence, if it cannot be obtained otherwise. They are bound to assume that the persons they are about to attack will exercise their right of private defence ; and, as it seems to me, they must therefore contemplate the probability of the use of very considerable force, and cannot with any shade of reason say that the hurt likely to be inflicted is likely to be limited at any precise degree. They possibly do not wish to cause the death of any man, and would be well content to gain their end without striking a blow, by the mere show of force, but for all that, it is their intention to strike if their end cannot be otherwise gained ; and if a very great amount of violence becomes necessary, and is used, either to overcome the resistance of the opposite party, or to extricate themselves from the position in which they have placed themselves (their opponents being still within the limits of their rights of self-defence), I, for one, cannot but say that the use of that amount of violence, and nothing less, was within their intention ; and that being so, I am forced to say that any probable result of that violence was within their knowledge. Homicide is certainly a probable result ; and it can hardly be that such homicide under the circumstances can be anything less as regards the individuals whose act directly causes death than murder ; and it therefore follows that the probability of the commission of the offence of murder was within their knowledge.

In this particular case we have one of the party to which the accused belonged, armed with a loaded gun, a weapon that could not be used as a weapon of offence without imminent risk to life, and, therefore, I look upon this case as one in which the probability of the commission of the offence of murder was more than usually great and more certainly within the knowledge of the parties. It may be that the accused could have shown circum-

stances from which the Court ought to infer that the use of that gun was not within their intention or knowledge, but I do not think that the prosecution was bound to prove that no such circumstances existed.

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Finding that the murder was committed in the prosecution of the common object of the unlawful assembly, and that it was an offence which the accused knew to be likely to be committed in the prosecution of that object, I am compelled by the words of s. 149 to hold the accused as members of the unlawful assembly are guilty of murder. I would, therefore, on this appeal uphold the conviction and sentence, leaving the question of mitigation of punishment to be dealt with separately.

PONTIFEX, J.—In this case the Sessions Judge has found that the act which caused the murder was sudden, and was unpremeditated by any member of the unlawful assembly. The evidence fully supports such finding. Under these circumstances I am of opinion that those members of the illegal assembly who did not commit the homicidal act cannot be considered guilty of murder under s. 149 of the Penal Code.

To apply that section to the case of murder, its alternative provisions must be read as follows :—“ If murder is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or if murder is committed by any member of an unlawful assembly, and the members of that assembly know murder to be likely to be committed in prosecution of that object; every person who, at the time of the committing of the murder, is a member of the same assembly, is guilty of murder.”

In the present case the common object of the illegal assembly was to obtain possession of land by a large armed force from a small unarmed party. In my opinion the evidence shows that the parties prosecuting that common object did not contemplate, or know it to be likely, that the offence of culpable homicide would be committed. The murder committed hastily by one member of the assembly was not, in my opinion, committed “ in prosecution ” of the common object of the assembly, in the planning of which no homicidal intention had been entertained.

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Nor could the members of the assembly think, and much less "know" murder to be likely to be committed "in prosecution" of a common object, which was intended to be, and which might naturally and probably have been, accomplished without homicide.

To bring the offence of murder, as defined by the Code, within s. 149, I think it must either necessarily flow from the prosecution of the common object, or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen. The offence of murder, as strictly defined by the Code, requires a previous intention or knowledge in the perpetrator; and to "know" that murder is likely to be committed is to know that some member of the assembly has such previous intention or knowledge. The word "know" used in the second branch of the section is, I think, advisedly used, and cannot be made to bear the sense of "might have known." This interpretation of s. 149, so far as murder is concerned, seems to me confirmed by comparing ss. 398 and 396 with ss. 148 and 149. From s. 398, it appears that, being armed with a deadly weapon at a dacoity, is considered an offence deserving of far greater punishment than the offence under s. 148 of being armed with a deadly weapon at a riot. The reason for this distinction must be that more serious consequences are likely, and must be known to be likely, to result from an armed assembly at a dacoity than at a riot, and yet, if murder is committed by one of five dacoits, the others are not guilty of murder, and may be sentenced to imprisonment for any time under ten years, while, if s. 149 is to be construed, as it has been construed by the Sessions Judge in this case, if murder is committed by one of five rioters, the others would all be guilty of murder, and must be sentenced to death or transportation for life, though less serious consequences would antecedently be likely to result than from a dacoity.

I am therefore of opinion that the prisoners who have appealed are not guilty of murder; but as it appears from the evidence that they were members of an illegal assembly, and were all armed with *lattis*, they are guilty of an offence under s. 148, and ought, in my opinion, to be sentenced to three years' rigorous imprisonment.

PHEAR, J. (after stating the facts as above).—It appears to me that the reasoning by which the Judge on the facts thus stated by him brings the charge home to the prisoners is somewhat incomplete. The words of s. 149, Indian Penal Code, are as follows :—(*reads*).

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These words do not, in my opinion, support the view which the Judge expressed at the outset of his judgment, and by which he appears to have been guided to his final decision to the effect that, because murder was committed by one member of the assembly, therefore all the prisoners as taking part in the riot and having the same object in view, namely, to drive Fucker Buksh off the land, were in the eye of the law guilty of murder. It seems to me clearly not the case that every offence which may be committed by one member of an unlawful assembly while the assembly is existing, *i.e.*, while the members are engaged in the prosecution of a common object, is attributed by s. 149 to every other member. The section describes the offence which is to be so attributed, under two alternative forms, namely, it must be either, *1st*,—"an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly," or *2nd*,—"an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object."

Now, inasmuch as the continuance of the unlawful assembly is by the definition of s. 141 made conterminous with the prosecution of the common object, it seems tolerably clear that the Legislature must have employed the words "prosecution of the common object" with some difference of meaning in these two passages respectively. Also the mere fact that the Legislature though fit to express the second alternative appears to show very distinctly, that it did not intend the words "in prosecution" which are found in the first to be equivalent to "during the prosecution," for, if they were, then the second alternative would have clearly been unnecessary. And a comparison with this passage of the language which is used in s. 460, where the Legislature makes all the persons concerned in committing a burglary punishable with transportation for life, if any one of their number at the time of the committing of

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burglary causes death, &c., strongly bears out this view. I am of opinion that an offence, in order to fall within the first of the above alternatives, i.e., in order to be committed in the prosecution of the common object, must be immediately connected with that common object by virtue of the nature of the object: for instance, if a body of armed men go out to fight, their common object is to cause bodily injury to their opponents; and in that case death, resulting from injury caused, would be homicide committed in prosecution of the common object. And an offence will fall within the second alternative, if the members of the assembly, for any reason, knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by the nature of the object itself.

It seems, thus, on a little consideration, to be apparent that the two alternatives of s. 149 do not cover all possible cases of an offence being committed by one member of an unlawful assembly during the time when the common object of the assembly is being prosecuted. It follows that, in every trial of prisoners on a charge framed under the provisions of s. 149 of the Penal Code, even when it is proved that the specified offence was committed by one of the members of the assembly during so to speak the pendency of that assembly, it yet remains on issue of fact to be determined on the evidence, whether that offence was committed in prosecution of the common object as I have endeavoured to explain the meaning of those words in the first part of the section, and if not whether it was an offence such as the members of the assembly knew to be likely to be committed in the prosecution of the object.

Returning now to the particular facts of the present case, I think there appears to be abundant reason for coming to the conclusion that Tareboolah committed murder in the way described by the Judge. But it seems also clear that murder, of even the taking of life, was not immediately connected with the common object of the unlawful assembly of which the prisoners were members. That common object was, as the Judge expresses it, to drive Fucker Buksh off the land and to prevent him from cultivating it. There is however nothing in the

evidence to indicate that the members of the assembly were prepared and intended to accomplish that object at all hazards of life. I do not think that they intended to attain the common object by means, if necessary, of murder. Indeed the Judge himself says that "the resistance offered by Samed Ali and Sharef Ali was unexpected" by the prisoner's party, and that it "led to the sudden, and probably at first unintended, use of the gun by Tareboolah." This being so, I find myself unable, sitting as a Judge of fact, on this appeal, to arrive at the conclusion that Tareboolah committed murder in prosecution of the common object of the unlawful assembly, within the meaning of the first part of the section.

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Neither do I think it is satisfactorily made out by the evidence that the prisoners knew it to be likely that this offence of murder would be committed in the prosecution of the common object of the assembly within the meaning of the second part of the section, taking that object to be the driving Fuckeer Buksh off the land. It was *à priori* possible, and indeed most probable that that object would be effected without any risk of life whatever. The assailants had reason to suppose, indeed knew quite well, that the party they were about to attack was absolutely unarmed. The members, of the unlawful assembly generally, including the prisoners, might reasonably have expected (and there is nothing whatever in the event to show that they did not) that Fuckeer Buksh and his co-laborers would be driven off the land by the mere show of such force as they had, or at any rate by the use of force very far short of life-taking. And even if I allowed myself to be carried by the evidence so far as to think (as I do not) that the prisoners and the other members of the unlawful assembly knew that culpable homicide was likely to be committed in the prosecution of the common object, still I should be unable to say that their knowledge also included any of the ingredients of aggravation which are required in order to convert the offence of culpable homicide into the offence of murder. It is obvious that, in the events which happened, those ingredients were of sudden origin and were entirely personal to the actual murderer. Tareboolah committed murder by doing, on the spur of the moment, a

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previously unintended act, which act however he must himself be taken to have known at the time was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death, and which did in fact cause death. If then the prisoners knew that murder was likely to be committed in the shape in which it was committed they must have been ware that it was likely one of the members of the unlawful assembly would do an act which would be likely to cause death, and which would in fact cause death, a statement which on the face of it seems to be a contradiction of terms. In truth, when the second likelihood comes to be placed upon the first, it has the effect in my judgment of removing the case altogether from the scope of s. 149. And none of those forms of murder from which "likelihood" is absent are brought by the evidence in this case within the contemplation of the prisoners or of anybody else. There is nothing to suggest that the prisoners (or indeed any of them) knew that it was likely that an act would be done by one of the members of the assembly with any of the intents mentioned in the first three clauses of s. 300 of the Penal Code and would cause death.

On the whole I think that the prisoners have been wrongly convicted of the charge framed under s. 149. I think however that the facts established against them certainly amount to rioting; and it appears also that they were all armed with heavy *lattis*. Therefore, under the provisions of s. 148, they are punishable with imprisonment for a term which may extend to three years. Accordingly I would reduce the sentence passed by the Sessions Judge to a sentence of rigorous imprisonment for three years.

JACKSON, J.—It appears to me that the construction of this section (149), that is, a construction which shall be at once reasonable and grammatical, involves two difficulties, or at least two points which call for attentive consideration:—

1st.—“The common object.”

2nd.—“Or such as the members of that assembly knew

to be likely to be committed in the prosecution of that object."

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It has been proposed to interpret the "common object" in a precise sense, so as to indicate the exact extent of violence to which the rioters intended to go, namely, to take possession of the land by force, extending, if need be, to wounding and the like. This, I think, is not the sense in which the words were intended to be understood. They are not, it seems to me, used in the same sense as "the common intention" in s. 34, which means the intention of all, whatever it may have been. The words here seem to have manifest reference to the defining section (141), and to point to one of the five objects, which being common to five or more persons assembled together, make their assembly unlawful. For this reason I think that any attempt to mitigate the rigor of the section by limiting the construction of the words "common object" must fail, and that any offence done by a member of an unlawful assembly in prosecution of the particular one or more of the five objects mentioned in s. 141, which is or are brought home to the unlawful assembly, to which the prisoner belonged, is an offence within the meaning of the first part of the section.

We then come to the second point, i.e., the meaning to be given to the words "or such as the members," &c. If the word "or" has been used in an alternative sense, the sentence would, if fully expressed, run thus:—"If an offence is committed, which is committed in prosecution, or which, if not so committed, is yet such as the members knew to be likely," which seems absurd. Nor can it be believed that the Legislature intended to attach the consequences of (say) murder committed by a members of an unlawful assembly in prosecution, &c., to all members of that assembly, unless those members had a knowledge that the commission of murder was likely, as an incident of their endeavors to carry out the "common object." For this would be the consequence, if the word "or" be a simple alternative, and if the first condition being fulfilled, namely, that the act was committed in prosecution of the common object, it was unnecessary to resort to the second, in which case the finding would simply be that an offence, namely, murder,

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had been committed by a member of the unlawful assembly in prosecution of the common object thereof, although the person who actually committed the murder had used means not within the contemplation of the others, such as the firing of a concealed pistol, or the like, and all the other members of that assembly would thereupon be liable to be hanged or transported for life at the discretion of the Judge,—a thing which seems impossible to have been within the intention of the Legislature. But if the word “or” be treated, with some violence I admit, as illustrative, or instead of “and,” and the knowledge of likelihood be thus a further condition imposed, the law becomes at once reasonable and intelligible.

In view of the difficulties caused by the section, I was at first strongly inclined to believe that the word “or” had crept in by a misprint, or clerical error, either instead of “and,” or simply as an addition to the text, and I applied for information to the legislative department. My learned friend, Mr. Whitley Stokes, however, assures me that the word appears in all the copies of the Code as successively considered and amended as far back as 1856 when the section, as it now stands, took the place of the original section, numbered 133, which may be seen at page 32 of the edition printed in England in 1851, and which was of a different character,

In the difficulty which besets us, the construction which I have suggested is the only one which seems to me possible, and I could not consent upon s. 149 to subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly, he himself had not directly contemplated, unless it was proved that he knew it to be likely that such offence would be so committed.

In the particular case before us, I concur in the view of the facts taken, and in the order to be made by the majority of the Court.

COUCH, C.J.—The appellants in this case have been convicted under s. 149 of the Penal Code. A comparison of this section with s. 460 shows, as has been noticed by Phear, J., that s. 148 is not intended to subject a member

of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. The difference of the language of the two sections seems to show that the legislative authority had in its mind the distinction between the two cases ; and it is not sufficient in order that a person may be convicted under s. 149 that there should be an unlawful assembly, that the members of it should be prosecuting the common object of it, and that an offence should be committed by one of them.

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I need not repeat the language of the section. It is divided, as it seems to me, into two parts, and in my opinion, in order to bring a case within the first part, namely, that which speaks of the offence being committed in the prosecution of the common object of the assembly, the act must be one which upon the evidence appears to have been done with a view to accomplish the common object. I think this is the meaning of that part of the section, and we must see whether the act was done with that view.

The Sessions Judge has found, and I think correctly, that the common object in this case was to drive Fuckeer Buksh off the land, and he has stated, I also think in accordance with the evidence, what occurred. "I do not doubt," he says, that the unexpected resistance offered by Samed Ali and Sharef Ali, but more especially of the former who was a young and powerful fellow, and who snatched a *latti* from the hands of one of his adversaries, and laid about vigorously with it, led to the sudden, and probably at first unintended, use of the gun by Tareboolah. Finding his party driven back by the two men Samed Ali and Sharef Ali, for the two old men Fuckeer Buksh and Kadez Ali were not of much account (though Fuckeer Buksh's right hand shows that it was considerably knocked about), Torab Ali raised his gun and fired striking the advancing Samed Ali full in the chest." That does not appear to me to be an act done by Tareboolah with a view to accomplish the object of driving the other party off the land but in consequence of the unexpected counter-attack of that party, and with a view to prevent or repel it. I think that is the fair conclusion from the evidence, and

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certainly in a case of this description where, if the accused are found guilty, they are liable to a sentence of death, if there is a reasonable doubt as to the view with which the gun was fired, they ought to have the benefit of it. I am unable to say upon the evidence in this case that the firing the gun was done in the prosecution of the common object of the assembly.

Then I have to consider the second part of the section that the offence is to be such as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object. At first there does not seem to be much distinction between the two parts of the section, and I think the cases which would be within the first offences committed in prosecution of the common object, would be generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part, and not within the first. Without laying down the law as to any other case than that before us, I think there might be a case of this kind; persons assemble with a view to attack and plunder the house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking, or the other offences which would be included in such acts as attacking and plundering a man's house; but from some cause, such as a show of resistance, they might not continue to prosecute that common object, and before they had dispersed, and whilst they continued to be an unlawful assembly, some of them might plunder another house and thereby commit an offence. Such a case might come within the second part of the section, as an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, but which was not committed in the prosecution of it. But that is a case which we should have to determine when it arises. I only mention it as showing that there may be cases which would come within the second, but not within the first part of the section.

The question in this case is whether upon the evidence we can say that these persons when they met together, with the

object of driving Fuckeer Buksh and his party off the land, supposing they knew that Tareboolah had a gun with him, knew also that he was likely to make use of it in such a manner as to be guilty of the offence of murder. Seeing what is necessary to constitute that offence, I am unable upon this evidence to come to the conclusion that these persons knew that this was likely. I think it is not only possible, but probable, that they did not think that the gun would be used in that manner by Tareboolah. And it seems to me upon the finding of the Sessions Judge that it was so, because he appears to have thought that the use of the gun was sudden and probably unintended. He seems to have thought that, if nothing more had occurred than driving the party off the land, and what might naturally be expected to happen in doing that, the gun would not have been used in such a manner as to make the person using it guilty of murder, and as I said in regard to the first part of the question, we are bound where there is a reasonable doubt to give the accused the benefit of it.

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I concur with the other members of the Court in thinking that the accused ought not to have been convicted under s. 149, but that they may properly be convicted under s. 148. The conviction will be altered accordingly, and the sentence will be one of three years' rigorous imprisonment.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Birch.

CHOWDHRY GOLUCK CHUNDER AND OTHERS (JUDGMENT-DEBTORS) v.
CHOWDHRY GUNGA NARAIN AND OTHERS (DECREE-HOLDERS).*

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May 30.

Decree, Error in—Power to amend Decree—Mistake—Appeal—Review.

A obtained a decree for costs in a suit brought by *B* against *A*, and the decree was confirmed on appeal to the High Court on 18th June 1869. On 13th December 1871, *A* applied for execution of the decree, but it was found that the decree omitted to specify from whom *A* was to obtain his costs, and it

* Miscellaneous Regular Appeal, No. 97 of 1873, from an order of the Judge of Midnapore, dated the 21st December 1872.

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was held that no execution could be taken out under the decree. *A* therefore, applied to the Judge who passed the original decree to amend the decree, and the decree was amended on 21st August 1872, by inserting *B* as the party who was to pay *A*'s costs. *A* then made a fresh application for execution, which was allowed. *Held* that the Judge had power to amend the decree notwithstanding it had been appealed from and confirmed by the High Court, and such order was appealable.

In this suit the present appellants were the original plaintiffs. They made the present respondents defendants, and it was held that they had been wrongly made defendants, and were therefore entitled to their costs. The decree was made on 13th July 1868. In the drawing-up of the decree, there was an omission, it not being stated from whom the defendants were to obtain their costs. The decree was confirmed on appeal to the High Court on 18th June 1869. On 13th December 1871, the respondents made an application for execution of their decree for costs. The omission in the decree was then discovered, and though the Judge allowed execution to issue, it was held on appeal to the High Court on 23rd May 1872 (1) that they could have no execution upon the decree as it stood. Thereupon, they applied to the Judge who passed the original decree to amend the decree, and the omission was on 21st August 1872 rectified by inserting the names of the appellants as the parties from whom the defendants were to obtain their costs. A fresh application for execution was then made, which was opposed by the appellants on the ground that it was barred by the law of limitation. The Judge held on 21st December 1872 that it was not barred; that the proceedings of 18th June 1869 kept the decree alive; and that the application for execution on 13th December 1871 was *bonâ fide*, notwithstanding it had been held that execution could not be taken out under the decree.

From that decision the plaintiffs appealed to the High Court.

Baboo *Doorga Mohun Doss* for the appellants.—The Judge had no power to amend the decree on 21st August 1872. The application was made more than three months from the date of the decree. The decree too, having been confirmed by the High Court, had become a decree of that Court. It was practically

(1) See *post*, p. 368.

an application for a review of judgment, and where an appeal has been preferred to the High Court, and admitted, a review will not be granted by the lower Court—*Lucas v. Stephen* (1), [MARKBY, J.—Was it an application for review?] Yes the Judge so treats it. The omission was not a mere clerical error. No sufficient cause was shown for the delay in making the application. As to limitation it is submitted that the application for execution on 13th December 1871 was not *bonâ fide*, and therefore the execution was barred.

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Baboo Bhowanee Churn Dutt for the respondents.—The appellants might have appealed from the order amending the decree; but they did not do so; such an order is appealable—*Shama Churn Chuckerbutty v. Bindabun Chunder Roy* (2) The Judge had power to amend this decree notwithstanding the appeal to the High Court—*Oomanund Roy v. Maharaja Suttish Chunder Roy* (3). The application was not an application for review under s. 376, Act VIII of 1859, but to correct a clerical error; the decree did not agree with the judgment, and the application was to amend that omission. The Court had power to correct such an omission—*Zuhoor Hossein v. Mussamut Syedun* (4), *Haradhun Mookerjee v. Chunder Mohun Roy* (5), and *Bunkoo Lal Singh v. Basoomunissa Bibee* (6).

Baboo Doorga Mohun Doss in reply:—*Shama Churn Chuckerbutty v. Bindabun Chunder Roy* (2) only shows that, where a review has not been applied for within three months, the High Court has power to look into the sufficiency of the cause for admitting it. The order of 21st August 1872 was not appealable; under s. 378, Act VIII of 1859, an order admitting a review is final: this was such an order. [BIRCH, J.—It was not entered on the record as application for review.]

The judgment of the Court was delivered by

MARKBY, J.—In this case it appears that a decree was passed on the 13th July 1868; that decree was brought up to this

(1) 9 W. R., 301.

(2) Case No. 1395 of 1866, 30 January 1868.

(3) *Id.*, 471.

(4) *Post.* p. 367.

(5) W. R., Sp. No., 66.

(6) 7 W. R., 166.

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Court upon appeal, and was confirmed by this Court on the 18th June 1869. The present respondents were defendants in the suit, and it is said that it appears from the judgment that it was the intention of the Court to dismiss the suit as against them, and to give them their costs. The respondents, however, took no proceedings in execution until the 13th December 1871, and when they applied for execution, it was discovered that the decree did not contain any direction by whom those costs were to be paid; it was consequently held by this Court that the respondents could have no execution upon the decree. Thereupon, acting upon a suggestion contained in the judgment of this Court, the respondents on the 21st August 1872 obtained from the Judge of the Court in which the original decree was passed an order amending the decree by inserting the names of the parties from whom they were to obtain their costs. That amendment, as we are as informed, was made in accordance with the judgment which had been passed. Then proceedings in execution were against commenced, and an order for issuing execution was made on the 21st December 1872, which is now before us on appeal.

An objection has been taken to that order that it has wrongly disposed of the question of limitation which was then raised before the Court. Upon that point we see no reason whatever to differ from the decision of the Court below.

The main question which has been argued is that the present execution-proceedings cannot be sustained, because the Court had no power to amend the decree on the 21st August 1872. Now, on looking into the record, it appears that that order of the 21st August 1872 was not an order passed in review under ch. XI of the Code of Civil Procedure, but was what is called a miscellaneous proceeding such as was suggested by a decision of this Court in *Oomanund Roy v. Maharajah Suttish Chunder Roy* (1), and whatever might have been our opinion independently of any authority as to the power of a Judge in the mofussil under the Code to amend a decree which has been confirmed in the presence of the parties by this Court on appeal, I think it is too late now, after that decision which I have just

(1) 9 W. R., 471.

referred to, and the other decision in *Zuhoor Hossein v. Mussamut Syedun* (1), and also the expression of opinion of Kemp

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(1) *Before Mr. Justice Norman and Mr. Justice E. Jackson.*

The 19th February 1869.

**ZUHOOR HOSSEIN AND OTHERS
(JUDGMENT-DEBTORS) v. MUSSAMUT
SYEDUN (DECREE-HOLDER).***

Decree, Amendment of—Power of correcting Error in,

Mr. R. E. Twisdale for the appellants.

Mr. C. Gregory and Munshee Mahomed Yusuff for the respondent.

The judgment of the Court was delivered by

NORMAN, J.—In this case the decree was originally passed on the 9th of December 1865. By that decree it was declared that the defendants should pay Rs. 3,265 in respect of wasilat of the year 1267 (1860) with interest, to the Hindu plaintiffs, and that the defendants should pay certain other plaintiffs' wasilat at Rs. 1,575 annually, after deducting the Government revenue, from the year 1268 (1861) to the date of possession. The decree did not proceed to give to the Mahomedan plaintiffs interest on the amount of wasilat awarded from the date of the decree. The defendants appealed to the High Court against the decision of the Principal Sudder Ameen, and that appeal was dismissed. They have since presented an appeal to Her Majesty in Council, which bears date the 12th of March 1867, but the papers have not been transmitted to England. On the 15th of June 1865, the Mahomedan plaintiffs presented a petition to the Principal Sudder Ameen, applying for an amendment of the judgment

on the ground that interest on the wasilat awarded to them had not been included in the decree, and that this was a mistake. The defendants objected to the rectification of the mistake. The Subordinate Judge, after hearing the defendant's objection, considered that it was perfectly legal and proper that the plaintiffs should be entitled to interest on the wasilat awarded to them from the date of the decree.

It is objected in special appeal that this decision was erroneous, inasmuch as the application to the Principal Sudder Ameen was not presented within the period of 90 days from the date of the original decree, and was therefore out of time under s. 377, Act VIII of 1859. We think, however, that merely adding to the decree an order that the decree was to bear interest from its date, was not an act done by way of review of judgment, because it does not appear that the Principal Sudder Ameen was altering, or called upon to alter, anything upon which the decree was passed: it was merely correcting a mistake by adding that to the decree which was already an incident to the then present right to recover the amount of the decree, being that, in respect of any forbearance to enforce the decree, pending the appeal or on default of immediate payment, the amount decreed shall bear interest. We think the Principal Sudder Ameen was right in treating it as a mistake which it was within his power to correct. If the proceedings had gone home, and we had found ourselves in any difficulty in securing to the defendant the power of objecting to the decree in the amended form

*Miscellaneous Regular Appeal, No. 517 of 1868, from an order of the Subordinate Judge of Bhaugulpore, dated the 29th August 1868.

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and Glover, JJ. in this very case, *Chowdhry Goluck Chunder v. Chowdhry Gunga Narain* (1), for a Division Bench to hold that

because the application was so late that the Privy Council might have heard the appeal, we should have felt the difficulty in saying that the amendment could be allowed. In the present case the appellant has failed to show that any injustice was done him by the allowance of the amendment which, as appears to us, was simply in furtherance of the decree. The appeal is dismissed with costs.

(1) *Before Mr. Justice Kemp and Mr. Justice Glover.*

The 23rd May 1872.

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AND OTHERS (JUDGMENT-DEBTORS) v.
CHOWDHRY GUNGA NARAIN AND
OTHERS (DECREE-HOLDERS).*

Decree, Amendment of—Power to amend.

Baboo Doorga Mohun Doss for the appellants.

Baboo Aushootosh Dhur for the respondents.

THE judgment of the Court was delivered by

GLOVER, J.—The judgment-debtor is the appellant in this case. He sued a certain number of defendants amongst whom are the present judgment-creditors. The case was decided in favor of the plaintiff against certain defendants, and as against Gunga Narain Masunt and Urdhub Narain, the judgment was that they had been improperly made defendants, and that the plaintiff should pay their costs. The case was appealed to the High Court, and the judgment of the Court below was affirmed. The former

defendants thus become judgment-creditors applied to take out execution and to get their costs when it was objected that they were barred by limitation, more than three years having elapsed from the date of the decree. The Judge considered that the time should count from the date of the decree of the High Court, and that therefore their application for execution was in time. Without going into the question whether or not the Judge was right on that point, although as a matter of fact, we are inclined to think that he was right, we think there is a *prima facie* objection to the judgment-creditors' claim. They say that the judgment of the Court below awarded their costs as against the party who brought the suit. Now as a matter of fact, although there is a remark in the judgment to the effect that these two persons have been improperly made defendants, and that they ought to have their costs from the plaintiff, still in the decree there is no such recital; it merely gives the plaintiff costs as against all the defendants.

It is contended by Baboo Aushootosh Dhur for these defendants that we ought to read the judgment and decree together, and if we can be reasonably certain that it was the intention of the Judge to award costs to the respondents, that we ought to give them such costs.

In the first place it is an extremely dangerous principle to allow any interpolation to be made in the wording of a decree, or to attach any meaning to the words of a decree which cannot be fairly and plainly

* Miscellaneous Regular Appeal, No. 116 of 1872, from an order of the Judge of Midnapore, dated the 9th February 1872.

such an order cannot be made. It appears that several Judges have expressed an opinion that such an order can be made, and it also appears from the decision in *Zuhoor Hossein v. Mussamut Syedun* (1) that such an order is open to appeal. And the order of amendment in this case having been made on the 21st August 1872, it is too late now to question it by way of appeal; and therefore being an order which the Court had power to make, and not having been appealed against, it must be taken as final. At the same time we think it right to add that, had this order been now open to question, we should have hesitated very much before confirming it. It is the duty of the parties or rather of their pleaders, when they obtain a decree, to see that it is drawn up in the proper form, and it has been ordered by a Circular Order of this Court of the 19th July 1867 (2) that the Judges should obtain the signatures of the pleaders before the decree is finally signed. If the parties choose to allow so long a time as that allowed in this case to elapse before they take any steps upon the decree without taking any precaution to see that the decree is properly drawn up, it seems to us that it may be fairly presumed that they acquiesced in the decree,

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attached to them, and in this case there can be no doubt that no costs are mentioned as being due to the present judgment-creditors. It was the easiest thing in the world for them on seeing the mistake or omission of the Judge on the decretal order to have applied to have that omission rectified. It is said that, in the schedule at the foot of the decree, there is a mention of Gunga Narain's costs, but it is not said in that schedule that they are to be paid by the plaintiff, and they are merely entered in the general list of the costs of the defendants without saying by whom they are to be borne. It is clear at all events that the schedule proves nothing, and the decretal order itself as already observed is silent. On the general principle therefore of the inadvisability of incorporating anything into a decree,

or of attaching to it a meaning which the words of the decretal order do not properly and clearly express, we think that we ought not to allow this execution for costs to issue. The creditors are still within time, and they can, if so advised, apply to the Judge to amend his original decree, and to give these defendants the costs which he considers due to them. We may observe that the Judge who passed the decree of 1868 is the same Judge who now presides in the Midnapore Civil Court, and therefore presumably well acquainted with the circumstances of the case.

We reverse the order of the lower Court, and decree this appeal with costs.

(1) *Ante*, p. 367.

(2) 8 W. R., Civ. Cir., 2.

1873 and that no alteration ought to be made subsequently. As
 CHOWDHRY however we have no power to interfere, the appeal must be
 GOLUCK dismissed with costs.
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Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Birch.

1873
 May 29. IN THE MATTER OF THE PETITION OF MOULVIE SYUD ZOYNOODDEEN
 HOSSEIN KHAN.*

Stamp-duty—Refund of Excess of Stamp-duty—Court Fees' Act (VII of 1870).

The plaintiff brought a suit for declaration of his *maliki* right over a certain *patni* tenure, and he alleged that the defendants had executed a *hida* in his favor in consideration of a diamond ring worth Rs. 30,000. He valued his suit at Rs. 5,600, being twenty times the *malikana* of Rs. 280 to which the petitioner alleged he was entitled. The Subordinate Judge held that the plaintiff was bound to value his suit at Rs. 30,000, the consideration mentioned in the *hida*nama. The plaintiff paid the deficiency, and his suit was ultimately dismissed. The plaintiff appealed to the High Court and valued his appeal at Rs. 5,600, which valuation was accepted by the High Court. On an application by the plaintiff for a certificate authorizing him to receive back from the Collector the excess of stamp-duty paid by him, *held* that the Court had no power to grant it, its power being limited to cases specified in ss. 13, 14, and 15 of the Court Fees' Act; but that there is nothing in the law preventing the Government from refunding any amount which they may think the plaintiff was improperly ordered to pay.

A RULE had been granted on the application of the petitioner calling on the Secretary of the Board of Revenue to show cause why an order should not be made authorizing the petitioner to receive a refund from the Collector of Dacca of Rs. 645 paid by the petitioner in excess of the stamp-duty chargeable in original suit 28 of 1870 instituted by him in the Court of the Subordinate Judge of Furreedpore on 12th March 1870. The rule now came on for hearing.

* *Rule Nisi*. No. 258 of 1873, from an order of the Subordinate Judge of Furreedpore, dated the 12th March 1870.

Baboo Kally Mohun Doss and Moonshee Mahomed Yusuf for the petitioner.

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The Senior Government Pleader (Baboo Annoda Prosad Banerjee) for the Secretary to the Board of Revenue.

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THE PETITION
OF MOULVIE
SYUD ZOY-
MOODDEEN
HOSEIN
KHAN.

The facts and arguments are sufficiently stated in the Judgment of the Court which was delivered by

MARKBY, J.—In this case it is stated in the affidavit on which the rule was granted, that the petitioner instituted a suit in the Court of the Subordinate Judge of Fureedpore for declaration of his *maliki* right over a *patni* tenure, and he alleged that the defendants had executed a *hiba* in his favor in consideration of a diamond ring worth Rs. 30,000. The suit was valued at Rs. 5,600, being twenty times the *malikana* of Rs. 280 which the petitioner alleged he was entitled to. The Subordinate Judge, on an objection taken by the defendants that the stamp-duty paid was insufficient, held that the plaintiff was bound to value his suit at Rs. 30,000, the consideration mentioned in the *hibanama*. The plaintiff accordingly paid the deficiency, the suit proceeded, and it was ultimately dismissed. The plaintiff then appealed to this Court, and again valued his appeal at Rs. 5,600, and that valuation appears to have been accepted by this Court without objection.

Now the plaintiff has come to us asking us to issue a certificate authorizing him to receive back from the Collector the difference between Rs. 330 and 975 which he alleges he was wrongly ordered to pay by the Subordinate Judge. A notice of this application was served upon the Board of Revenue, and the Government pleader has now appeared. He does not attempt to support the correctness of the decision of the Subordinate Judge, and he states that the Government are willing, if the Court think it can be done, to refund the excess fees so paid; but he submits that the Government have no power to do so of its own motion, and that this Court has no power to order it to be done.

Now the only question upon which we can now express any authoritative opinion is as to whether or not this Court can

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order that money to be refunded by issuing a certificate as asked for. We think we are bound to say that we have no such power. This Court can only order a refund in such cases as it is specially authorized to do so. And what those cases are, is stated in ss. 13, 14, and 15 of the Court Fees' Act under which, in the cases specified, certificates authorizing refunds may be granted; but the case does not fall within the language or spirit of either of those sections. There appear to be two cases in which this Court has acted upon those sections. One is *In the matter of the Petition of Prosunno Chunder Roy Chowdhry* (1), and the other is *In the matter of the Petition of Doorga Dass Dutt* (2). We think it is impossible to bring this case within those decisions, and therefore we must reject this application which asks us to issue a certificate authorizing the petitioner to get a refund from the Collector. But at the same time, as we have been asked to do so, we have no hesitation in expressing our opinion that, if the Government think that the plaintiff had

(1) *Before Mr. Justice Markby.*

IN THE MATTER OF THE PETITION OF PRO-
SUNNO CHUNDER ROY CHOW-
DHRY.

The 2nd September 1872.

THIS was a case referred to the High Court by the Deputy Registrar as follows:—

“The stamp law is silent as regards the refund of excess stamp fee paid in, or as regards the refund of stamp fee paid in by mistake.

“In a matter on the original side, where excess stamp fee had been paid in by an executor on a probate, the Board of Revenue, on the application of the executor for a refund of the excess, held that the law provided for no such refund (a).

“A Full Bench has, however, held (per the late Hon'ble Chief Justice Sir Barnes Peacock):—‘It appears to

(a) Since writing the foregoing, I find that the Government has directed, on a reference from Bombay, that excess stamps put in by mistake in matters of administration should be refun-

have been the object of the Legislature that where there has been no final decision, and the stamp-duty paid on the petition of appeal has consequently become ineffectual, the party should be entitled to a refund of the stamp-duty” (b)

“As regards the particular matters now before the Court, it is presumed that the applications, though not directly for review, are of that nature, and may therefore be treated as falling under the purview of s. 15, Act VII of 1870.”

Baboo Anund Chunder Ghose for the petitioner.

MARKBY, J.—I see no reason why the stamp should not be refunded in this case on the authority of the case referred to.

(2) B. L. R., Sup. Vol., p. 511,

ded (see *Gazette of India* of 17th September 1872, p. 782).

(b) *In the matter of Doorga Dass Dutt*, B. L. R., Sup. Vol., p. 511.

been improperly ordered to pay a sum of money which was not due, there can be no possible difficulty in their refunding that amount to him notwithstanding the absence of any special provision of the law authorizing them to do so.

Rule discharged.

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ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

S.M. GOLAUPMONEE DOSSEE v. S.M. PROSONOMOYE DOSSEE.

Suit in Formâ Pauperis—Next Friend a Pauper—Infant.

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July. 14.

A suit can be brought in *forma pauperis* by a next friend who is also a pauper.

THIS was a suit in *formâ pauperis*, and was instituted by the father of the plaintiff as her next friend, she being an infant.

Mr. *Bonnerjee*, for the defendant, took a preliminary objection that a suit in *formâ pauperis* could not be brought by a next friend. He referred to Macpherson on Infants, 377, and an *Anonymous case* (1). Such is the practice in England. By the practice of the Supreme Court, no suit could be brought on behalf of any infant without leave previously obtained from the Court on special affidavit stating the circumstances and reasons that it was for the benefit of the infant that the suit should be instituted; see Smoult and Ryan's Rules and Orders, vol. II, pp. 4 & 130. Act VIII of 1859 never intended that a pauper suit should be brought by a next friend.

Mr. *Piffard*, for the plaintiff, contended that, if that were so, it would create great hardship to infants desirous of suing in *formâ pauperis*: it was never intended that a party should be in a worse position because he is an infant, than he would have been, if he had had been of full age. If the present plaintiff had not been an infant, she could have sued in *formâ pauperis*, but if the present objection is good, she could not sue. The privilege to sue in *formâ pauperis* is the privilege of the person entitled to

(1) 1 Ves., Jun., 409,

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 DOSSEE' sue. The plaintiff would not be liable to give security for costs, nor would the next friend, as he would not be liable for anything for which the plaintiff was not liable. [MACPHERSON, J.—That would be allowing him to sue in *forma pauperis*—see Daniell's Chancery Practice, 4th ed., p. 39; *Lindsey v. Tyrrell* (1).] Then the infant could not sue at all. The Lord Chancellor in that case says there must be some means of enabling the infant to assert her rights. How can she do so except by her next friend?

Mr. Bonnerjee in reply.—By the authorities the rule seems to be that at any rate special circumstances must be shown for allowing such a suit to be brought.

Mr. Piffard asked to examine the father of the plaintiff. He was accordingly called and examined.

Mr. Bonnerjee submitted on the evidence that no special circumstances had been made out. The evidence that he was a pauper was not satisfactory. Unless it is shown that he is a pauper, and that he knows no person of substance whom he can get to bring the suit for him, he ought not to be allowed to sue.

Cur. adv. vult.

MACPHERSON, J., said that he thought that on the authorities in England a suit on behalf of a pauper by a next friend who was also a pauper could be brought.

Attorney for the plaintiff: Mr. Leslie.

Attorney for the defendant: Baboo P. C. Mookerjee.

(1) 24 Beav.. 121; S. C. on appeal, 2 DeGex & Jones, 7.

PRIVY COUNCIL.

MUSSAMUT MULLEEKA (DEFENDANT) v. MUSSAMUT JUMEELA
AND OTHERS (PLAINTIFFS).

P. C.*
1872
Dec. 21.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Mahomedan Law—Dower—Amount—Limitation—Regulation III of 1793,
s. 14—Practice—Form of Decree—Costs—Act VIII of 1859, s. 98—
Compromise.*

Where dower is "prompt," limitation does not begin to run until the dower is demanded, or the marriage is dissolved by death or otherwise. See also 15 B.L.R. 310

The amount claimed, viz, Rs. 16,25,000, not having been disputed in the Court of original jurisdiction, was allowed.

Quere.—Whether, in the case of a divorce, a cause of action accrues in respect of deferred dower, before the repudiation has become irrevocable, or the dower has been demanded.

THIS was an appeal from two decrees of the High Court, dated 31st May 1864 (1) (Norman and Loch, JJ.) and 10th January 1866 (2) (Bayley and Pundit, JJ.), the latter being given after a remand.

The suit was by the first respondent, Mussamut Jumeela, as widow of one Syud Mahomed, and by the other respondents, as purchasers of shares in her claim, to recover a *denmohur* of 90,000 gold mohurs and Sicca rupees 90,000 making a total of Co.'s Rs. 16,32,000, settled on her by her husband Syud Mahomed, since deceased, the defendants to the suit being another widow (now appellant), and his heir Syud Mahomed Hossein.

The following were the steps taken in the suit:—The plaint was filed in September 1860: in March 1862 the Principal Sudder Ameen held the suit barred by the law of limitation, he considering the dower to be "prompt" and due on the marriage:

* *Present*:—THE RIGHT HON'BLE SIR JAMES COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER, AND SIR LAWRENCE PEELE.

(1) W. R., Jan. to July 1864, 232.

(2) 5 W. R., 23.

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King, one of the plaintiffs, who had purchased a share in the claim, did not appeal, but the other two plaintiffs, and another purchaser of a share (Lokenath Misser), did so; and, on the 31st May 1864, the High Court held that the dower need not have been sued for during the husband's life, and remanded the case for an enquiry as to the amount of the dower.

The defendant Mussamut Mulleeka, and Syud Mahomed Hossein both appealed against that decree to Her Majesty in Council, but in the meantime the trial under the remand went on, and the Principal Sudder Ameen decreed the suit for the amount claimed in favor of the widow and King and Summunt Koonwaree. Mussamut Mulleeka and Syud Mahomed Hossein both appealed to the High Court, but before the appeal came on, the latter, so far as he was concerned, compromised all matters in difference in the suit. On the 10th January 1866, the High Court having dismissed the appeal, Mussamut Mulleeka appealed to Her Majesty in Council against that decree also.

The facts of the case were shortly these :—The respondent Jumeela was married in 1833 to Syud Mahomed, who was said to be dewan to the Maharajah of Korruckpore; but as to this there was some doubt.

Disputes arose between the husband and wife about three years after the marriage, and from that time they lived separately until his death in February 1854. On his death the appellant obtained possession of his property, and it was not until the 3rd April 1860 that the present suit was begun.

The defences set up were that there had been a divorce, and that the dower was “prompt,” and therefore that it was barred by the law of limitation: there was then no specific case set up as to the amount claimed.

The evidence was conflicting as to whether the dower was “prompt” or “deferred,” and the Principal Sudder Ameen decided that nothing having been fixed as to the time of payment it was “prompt,” and ought to have been sued for in twelve years from the marriage, and therefore that the suit was barred by the law of limitation.

As to the question of divorce the evidence was conflicting, it appearing that proceedings had taken place before the Magistrate

in which the wife had herself alleged that she had been divorced; while, on the other hand, it was alleged that the husband had filed petitions claiming her as his wife. Mutual charges of forgery as to these petitions were adduced at the trial.

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The decision of the Principal Sudder Ameen on the law of limitation was reversed by the High Court on the authority of *Ameeroonissa v. Mooradoonissa* (1), and they, holding that there was no divorce, remanded the case for trial as to the amount of dower.

The Principal Sudder Ameen, as above-mentioned, found for the whole amount claimed, and the High Court on appeal affirmed that decision. The two appeals now came on for hearing.

Mr. *Doyle* for the appellant.—The case is not to be governed by the decision in *Ameeroonissa v. Mooradoonissa* (1). In that case the plaintiff was the heir-at-law, and he did not raise the question of limitation by his plaint. The defendant was the widow, who had remained, for several years, after her husband's death, in possession of the estate, over which she claimed a lien for her dower, and she had lived on terms of amity with her husband. But here is a case where, if there was not a divorce, there was a separation, a denial of the wife's rights, and she is simply a creditor seeking to recover a debt due at the time of the marriage; she is barred by Regulation III of 1793, s. 14. See *Hedaya*, Vol. I, p. 150; *Baillie's Mahomedan Law*, p. 91. There was no demand necessary, for the dower was "prompt," so *Simpson v. Routh* (2) would not apply—see *Meer Nujiboolah v. Mussamut Doorduna Khatoon* (3) and *Noorunissa Begum v. Nawab Syud Ali Khan* (4). The learned Counsel then proceeded to argue as to there having been a divorce, and as to the amount claimed being too large. As to the form of decree, King's share must be excluded, as he never appealed against the first finding of the Principal Sudder Ameen, and his rights are therefore not before the Court—*Mussamut Jaraitoolbutool v. Mussamut Hosseinee Begum* (5).

(1) 6 Moore's I. A., 211.

(4) 7 Sel. Rep., 40.

(2) 2 B. & C., 682.

(5) 11 Moore's I. A., 207.

(3) 1 Sel. Rep., 103.

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Mr. *Leith* and Mr. *C. W. Arathoon* for the respondent (after arguing as to the amount and as to the divorce). The principle is clear if there was no divorce, even if the dower be "prompt," limitation runs from the date of demand, or from the death of the husband—*Nawab Jung Bahadoor Khan v. Mussamut Uzeez Begum* (1); Baillie's *Mahomedan Law*, p. 125; *Ameer-oonissa v. Mooradoonissa* (2). The point is concluded by this authority.

Mr. *Doyle* in reply.

Their LORDSHIPS gave the following judgment :—

The appellant was one of the defendants in the Court below. The suit was brought to recover a very large sum of money—viz., Rs. 16,25,000, upwards of 160,000*l.*, as the balance due on account of *denmohur*, or dower, alleged to have been settled upon the plaintiff Jumeela by her late husband Syud Mahomed

The suit was instituted by Jumeela and two other persons, viz., Mr. H. O. King, a mooktear, and Mussamut Summunt Koonwaree, Mr. H. O. King being a purchaser for the sum of Rs. 5,000 of one-fourth part of the amount alleged to be due to the plaintiff Jumeela, and also of one-fourth of her share in the landed estate of her deceased husband; and the plaintiff, Mussamut Summunt Koonwaree, being also a purchaser of another fourth part of Jumeela's *denmohur* and of her share of her deceased husband's estate for a like sum of Rs. 5,000.

The dower was described in the plaint as *denmohur mu'ajil*, or dower payable at a future period, on divorce or death of the husband.

The defendants pleaded limitation, upon the ground that the plaintiff had been divorced by her husband more than twelve years before the commencement of the suit.

Three issues were laid down :—

1. Whether Syud Mahomed actually divorced the plaintiff, Mussamut Jumeela, his wife?

2. How much of the *denmohur* was payable immediately? and how much deferred?

(1) S. D., N. W. P., 1845, 180.

(2) 6 Moore's I. A., 211.

3. Whether, with reference to the determination of the first and second issues, the suit was barred by limitation ?

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With reference to the last issue, it should be stated that the suit was commenced on the 3rd of September 1860, and that the period of limitation was that fixed by Regulation III of 1793, s. 14, viz., twelve years. The marriage took place more than twelve years before the commencement of the suit. Syud Mahomed died on the 21st February 1854—more than six years, and less than twelve years, before the commencement of the suit.

The case was tried by the Principal Sudder Ameen of Bhaugulpore upon the second issue in the first instance. He found that the *denmohur* was prompt, and with advertence to that finding, he held that the twelve years ought to be calculated from the date of the marriage, and that, consequently, the suit was barred by lapse of time. He did not consider it necessary to try the first issue, whether the plaintiff had been divorced or not, but dismissed the suit with costs on the ground of limitation.

The case was appealed to the High Court for a 12-anna share of the sum claimed on account of *denmohur*, exclusive of the one-fourth share of Mr. H. O. King, who did not join in the appeal. The petitioners in the appeal were Jumeela and Summut Koonwaree, and also one Lokenath Misser, who, pending the suit, viz., on the 31st March 1862, purchased from Jumeela, for the sum of Rs. 400, a 2-anna share of her *denmohur*.

The appeal was heard by a Division Court. They found that the divorce was not proved, and held that the suit was not barred by limitation. They reversed the decision of the Principal Sudder Ameen, and remanded the case to him to try what was the amount of the dower. That was on the 31st of May 1864.

The defendants, on the 23rd June 1864, appealed to Her Majesty in Council against that decision.

The case having gone back upon remand under the decision of the High Court, the then Principal Sudder Ameen, a Mahomedan, proceeded to try what was the amount of the dower. Many witnesses were examined on both sides, and he

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found that the *denmohur* was settled at one lakh and eighty thousand, one moiety, rupees and the other gold mohurs, and he gave a decree for the plaintiffs for the amount claimed, viz., Rs. 16,25,000, with costs and interest. He came to that conclusion not only upon the evidence of witnesses who spoke to what actually took place, but upon the evidence of other witnesses, to whom he gave credit, that the custom prevailing in the plaintiff's family, and also in most of the other respectable families in Bhaugulpore, was in accordance with the amount which the other witnesses proved to have been actually settled in their presence.

On the 13th February 1865, an appeal was preferred by the defendants to the High Court against that decision. The case was heard before a Division Bench of the High Court, and the appeal was dismissed with costs.

The defendant, Mussamut Mulleeka alone, on the 5th July 1866, appealed to Her Majesty in Council against the last-mentioned decree of the High Court, the other defendant having compromised the claim against him.

We have, therefore, under the two appeals before us to consider whether the judgment of the High Court overruling the plea of limitation, and remanding the case, and the decision as to amount of dower, are correct or not. Their Lordships are of opinion that a divorce was not proved. In this respect they concur in the finding of the High Court upon a question of fact. They intimated that opinion in the course of the argument.

It is now to be considered whether the suit was barred by limitation. In the first place we will consider whether it was barred if the dower was prompt.

The Principal Sudder Ameen on the first trial held that, as the dower was settled without any specification as to the time at which it was to be payable, it must, according to the Mahomedan law, be considered to be *denmohur muâjil*, to be paid, to use his own words, "on demand, or immediately on demand by the wife." The High Court upon the first appeal considered the Mahomedan law to be precise, that, if nothing is said at the time, the dower is to be considered exigible; but they held

upon the authority of *Ameeroonissa v. Mooradonissa* (1) that, although the dower was exigible, the plaintiff Jumeela was not bound to sue for it during the life of her husband. Their Lordships are of opinion that the Principal Sudder Ameen who first tried the case, and who considered that the dower was payable on demand, was not correct in holding that the cause of action accrued to the wife before dissolution of the marriage without demand. There are no doubt conflicting decisions as to the period at which a cause of action accrues to a wife in respect of prompt dower. Prompt dower is said to be exigible immediately. Macnaghten, in his *Principles of Mahomedan Law*, p. 59, says:—"Where it has not been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand." The word "exigible" implies that it may, not that it must, be exacted, and therefore it would seem that a cause of action in respect of it does not accrue so long as the marriage exists, until the wife does something to show that she requires it to be paid. According to the Mahomedan law, a woman may refuse herself to her husband as a means of obtaining so much of her dower as is prompt—Baillie's *Digest of Mahomedan Law*, p. 125. That is a mode of exacting it. But she is not obliged to adopt it. It is optional with her either to insist upon the payment of her prompt dower during her husband's lifetime, or to wait until the dissolution of the marriage. In *Meer Nujiboolah v. Mussamut Doorduna Khatoon* (2), it was held that the right to prompt dower was barred by limitation in consequence of the period which had elapsed since the date of the settlement, although, at the time of the commencement of the suit, twelve years had not elapsed since the husband's death. That decision was followed in *Neorunissa Begum v. Nawab Syed Ali Khan* (3). In the case of *Nawab Jung Bahadur Khan v. Mussamut Uzeez Begum* (4), the Court pointed out the distinction between a contract to pay on a stipulated date, and a contract to pay on demand, and said that, in the former case, should the obligor

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(1) 6 Moore's I. A., 211,

(3) 7 Sel. Rep., 40.

(2) 1 Sel. Rep., 103.

(4) S. D., N. W. P., 1845, 180.

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fail to pay on the stipulated day, a cause of action would then accrue for the recovery of the sum due, but that in the case of an obligation to pay on demand (which they considered an obligation to pay exigible dower to be), there was no infraction of the obligation, and, consequently, no legal cause of action before demand. From the case of *Ameeroonissa v. Moora-doonissa* (1), it would seem that the Lords of the Judicial Committee were of opinion that limitation, in respect of prompt dower, did not run from the time of the marriage, but from the death of the husband. In that case there was a settlement by which the husband agreed to pay dower when demanded by his wife. The wife was not suing for her dower, but was in possession of her deceased husband's property, and set up her right of dower in answer to the husband's heir, who sued to recover possession of the estate. In that case the Lord Justice Knight Bruce expressed the opinion of the Judicial Committee that a wife was not obliged to sue her husband immediately, or in his lifetime, and that limitation did not apply as a bar to her claim for dower. If the principle of that decision be followed in the present case, the plaintiff is not barred by limitation. In the case of *Simpson v. Routh* (2), which was referred to in the last-mentioned case, Lord Tenterden said:—"In this, as in other cases where a demand is necessary to give a right of action, the commencement of the action is not of itself a demand." In Macnaghten's Precedents of Mahomedan Law, p. 273, it is said:—"The dower becomes due on the consummation of the marriage, or the death of either of the parties or on divorce. Should the wife not claim the payment of it during the lifetime of her husband, it must be paid to her out of the property left by him on his decease." Their Lordships are of opinion that the case of *Nawab Jung Bahadoor Khan v. Mussamut Uzeez Begum* (3), above cited, was rightly decided, and that, in respect of prompt dower payable under the Mahomedan law, limitation does not begin to run before the dower is demanded, or the marriage is dissolved by death, or otherwise.

(1) 6 Moore's I. A., 229.

(3) S. D., N. W. P., 1845, 180.

(2) 2 B. & C., 62.

In the present case, as a divorce was not proved, it is unnecessary to consider whether, even in the case of a divorce, a cause of action accrues in respect of deferred dower before the repudiation has become irrevocable, or the dower has been demanded. Their Lordships having determined that there was no divorce, and that the suit was not barred by limitation if the dower was prompt, it becomes unnecessary to determine whether it was prompt or deferred; for the suit having been commenced within twelve years from the time of the death of Syud Mahomed, it was clearly not barred if the dower was deferred.

The question as to the amount of dower was one of fact, as to which their Lordships see no reason to interfere with the decision of the Principal Sudder Ameen, which was affirmed on appeal by the High Court. Their Lordships concur in the remark of the High Court:—"It may be true that the sum claimed and deposed to as agreed upon and customary is a very large sum; but the Mahomedan law-books, the decided cases, and the experience of the country, show that it is a fact that sums so apparently beyond the means of the parties are fixed as dower amongst Mahomedans from the highest to the lowest." There is nothing in the Mahomedan law to limit the amount fixable for dower, see 1 Macnaghten's Select Cases, p. 275, and *id.*, p. 48, in which the amount fixed was 3,00,000 gold mohurs; see also the same vol., p. 266. The above cases it should be remarked, were decided upon the authority of *fatwas* obtained from the Mahomedan law officers. In Macnaghten's Precedents of Mahomedan Law, p. 131, there is the opinion of Mahomedan law officers that a dower exceeding 1,50,000 gold mohurs, which absorbed the whole estate of the husband, took precedence of claims by inheritance. No defence was set up in the Court of original jurisdiction upon the ground that the amount fixed was a mere sham, and that neither of the parties intended that it was to be acted upon, and it is not for a Court of Appeal to suggest or give effect to such a defence when it was never raised in the Court of original jurisdiction, which, if the question had been there raised, might have laid down a distinct issue, and taken evidence upon the

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subject. In Macnaghten's Principles of Mahomedan Law, case 35, p. 288, a very large amount of dower was upheld on a question put to ascertain whether the deed of dower was a mere device to prevent divorce.

The judgment of the Principal Sudder Ameen upon the trial after the remand was "that a decree should pass in favor of all the plaintiffs, viz., 'Mussamut Jumeela, Summant Koonwaree, and Mr. King,' to this effect that they, the plaintiffs, do recover the amount in suit with interest and costs from the defendants in possession of the property left by Syud Mahomed, in proportion to their appropriations, as well as from the property left by the said deceased." No decree appears to have been drawn up upon that judgment, as it ought to have been. The High Court dismissed the appeal from that decision with costs. The judgment accordingly stands. It appears to their Lordships that the judgment was not correct. Mr. King, not having appealed from the first decision, viz., that of the Principal Sudder Ameen of the 8th March 1862, was not entitled to the benefit of the reversal of that judgment—*Mussamut Jaraitoolbutool v. Mussamut Hossainee Begum* (1), and the judgment under the remand ought not to have been in his favor, but ought to have been limited to the 12-anna share, to which alone the appeal related. Further their Lordships are of opinion that the decree is erroneous in awarding the demand against the defendants in proportion to their appropriations, and in rendering them personally liable to that extent in addition to the charge upon the assets. The defendants were not liable except as representatives of the deceased. As representatives they were liable for the whole debt to the extent of the assets received, and not duly administered by them respectively. It is not because an executor or heir has only three-fourths of the assets that he is liable only to three-fourths of the debt. He is liable to pay the whole debt so far as the assets in his hands will go. Whatever the amount of assets, the proper form of decree against the two defendants, sued jointly as representatives, is that the plaintiff do recover the

(1) 11 Moore's I. A., 207.

whole amount against the defendants as representatives of the deceased to be paid out of the property of the deceased. Each of the defendants would then be liable for the whole debt to the extent of the assets received by him, and the decree would be executed by the attachment and sale of as much as necessary of the property of the deceased in the hands of both or either of the defendants; and if no such property could be found, and the defendants should fail to satisfy the Court that they had duly applied such property of the deceased as should be proved to have come into their several possessions, the decree might be executed against the defendants respectively to the extent of the property not duly applied by them, in the same manner as if the decree had been obtained against them personally, or, in other words, by the attachment and sale of their own private properties (Act VIII of 1859, s. 203). If, however, the decree were against one of the defendants for three-fourths of the debt, and against the other defendant for one-fourth, and the defendant against whom the decree for one-fourth was given should prove, under the execution, that he had duly applied the whole of the one-fourth of the assets which had come to his hands in payment of other just debts due from the deceased, the decree-holders could not levy more than three-fourths of the debt upon the other defendant, notwithstanding the assets in his hands might be sufficient to pay the whole debt, and thus they would be deprived of one-fourth of their demand, notwithstanding the rule of Mahomedan law that all the assets must be applied in payment of debts in preference to claims by inheritance.

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If matters had remained as they were when the Principal Sudder Ameen gave judgment upon the trial after the remand, the decree might be set right by declaring that the plaintiff's Jumeela and Summunt Koonwaree, do recover three-fourths of the amount of dower from the defendants as representatives of the deceased, to be paid out of the assets of the deceased. But it appears that one of the defendants, viz., Syud Mahomed Hossein, after the decree of the Principal Sudder Ameen under the remand and before the decree of the High Court upon the appeal against that decree, compromised the claim against him. The *solenama*, or deed of compromise, was made between

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the plaintiff, Jumeela, and Kassim Ally Khan, described as purchaser of the share of Bebee Jumeela, the plaintiff Summut Koonwaree, Lokenath Misser, and the defendant Syud Mahomed Hossein. After reciting that certain suits were depending between them, each of the parties renounced and relinquished every sort of claim, and declared that there remained no claim one against another. By paragraph 1, it was declared that, out of the 16 annas of the property of the late Syud Mahomed, 12 annas had come into the possession of the defendant Syud Mahomed Hossein, and of purchasers from him, of which 5 annas and 9 pie came to the defendant Mahomed Hossein as his share, and the remainder, 6 annas and 3 pie, came to the plaintiff Mussamut Jumeela and others as their share, (meaning that, by the terms of the compromise, they were to have a 6-anna 3-pie share). By paragraph 2 it was declared that, out of the 6-anna share (meaning, no doubt, the 6-anna 3-pie share), the plaintiff Jumeela, and at the then present moment Kassim Ally Khan, who was stated to be the purchaser of her share, had accepted 2 annas; the plaintiff (Mussamut Summut Koonwaree, in lieu of the entire properties (that is, the shares of Jumeela's dower purchased by her), accepted a 3-anna 6-pie share; and Lokenath Misser, in lieu of his purchase, accepted a 9-pie share. These shares constituted the whole of the 6-anna 3-pie share of the estate of the deceased, which was given by the defendant Mahomed Hossein in satisfaction of the claim against him. By the 9th paragraph it was declared that all differences existing between the parties to the compromise having been cleared up, thereafter no manner of claim whatever remained to be instituted one against another either regarding the payment of *donmahur* or the expenses of the suits therein mentioned, or for the recovery of *wasilat* (mesne profits) and each of the declarants renounced and relinquished the total expenses of all suits from the beginning up to the then present moment. By paragraph 10 the parties agreed to file petitions of agreement in the cases of appeal to England and to the High Court, and the Zillah Courts, and Mahomed Hossein relinquished the security-bond in the case in appeal to the Privy Council. Paragraph 11 was as follows:—

"Since the conditions of this *solenama* are in accordance with the aforementioned detail regarding the 12 annas share, and the 4 annas share of the property left by Syud Mahomed has come into the possession of Mussamut Mulleeka, the same has no concern with Hajee Mahomed Hossein and others. It has, therefore, been settled between Mussamut Jumeela, Kassim Ally Khan, Summunt Koonwaree, and Lokenath Misser, that the whole or any portion of the 4 annas which may be acquired by the compromise, or in execution of the decree for the *denmohur*, or by means of the institution of a suit for Mussamut Mulleeka, shall be partitioned into sixteen shares, out of which Mussamut Summunt Koonwaree shall take ten shares, and five shares Mussamut Jumeela and Kassim Ally Khan, and one share Lokenath Misser."

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In pursuance of the agreement in paragraph 10, the *solenama* was sent up to the High Court, and was recorded, and forms part of the record before us.

The suit ought, according to the provisions of s. 98, Act VIII of 1859, to have been disposed of in accordance with the terms of the compromise. The decree of the High Court, after referring in express terms to the compromise, dismissed the appeal, and thereby in substance upheld the decision of the Principal Sudder Ameen of the 28th September 1864. It was certainly not in accordance with the compromise, for the decree of the Principal Sudder Ameen ordered the defendant Mahomed Hossein to pay a proportion of the debt and costs; and the decree of the High Court ordered him to pay the costs of the appeal, though the plaintiffs had expressly renounced all costs.

It is important to remark that the 6-anna 3-pie share of the estate which was given by the defendant Mahomed Hossein, in satisfaction of the claim against him, consisted of immoveable estate. Their Lordships know nothing as regards the value of the whole of the estate, or of the 6-anna 3-pie share accepted by the plaintiffs in satisfaction of their claim against the last-named defendant.

It appears to their Lordships that the effect of the compromise was to release the defendant Mahomed Hossein and the 12-anna share, or three-fourths of the assets which came to his hands, and consequently to release the other heirs and the remaining one-fourth of the assets, from that portion of the

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debt which, as between the several heirs, ought to be borne by the three-fourths of the assets released, or, in other words, from three-fourths of the amount claimed. That is the construction which the High Court, by their decree, appear to have put upon the compromise. If the whole debt should be decreed to be levied out of the remaining one-fourth of the assets, the plaintiffs, having received a 6-anna 3-pie share of the whole estate, might still levy the whole debt, and thus obtain more than they are entitled to; and if the debt should be levied out of the remaining one-fourth of the assets, the defendant Mahomed Hossein would, as between him and the other heirs, be liable to contribute three-fourths of the amount so levied, notwithstanding the compromise by which he gave a 6-anna 3-pie share of the estate in discharge of the liability of the 12-anna share of the assets which came into his possession, and to enable him to retain, as against the plaintiffs, the other 5-anna 9-pie share of the assets. Their Lordships therefore think that, in consequence of the compromise, the remaining one-fourth of the assets is liable for only one-fourth of the debt.

The shares of heirs cannot be ascertained until all debts have been satisfied. It is only the balance after paying all debts that, according to the Mahomedan law, is divisible amongst them. A compromise operates for the benefit of all those amongst whom the estate is divisible, and the balance is divisible amongst them (see Baillie on the Mahomedan law of inheritance, p. 108). If the compromise made by Mahomed Hossein by giving up to the plaintiff a 6-anna 3-pie share of the estate operated for his benefit alone, and to release the three-quarter share of the assets which he took by inheritance, the result would be that he might retain a 5-anna 3-pie share of the estate of the 12-anna share which came to his hands, whilst the other fourth of the estate in the hands of Mulleeka might be seized and sold for payment of the remainder of the debt, and thus be wholly absorbed. By these means Mahomed Hossein, as one of the heirs, would obtain a 5-anna 9-pie share of the estate, whilst the other heirs would get nothing, which would be contrary to the principles of the Mahomedan Law of Inheritance.

It may be, and probably is, the fact that even one-fourth of

the debt will absorb the whole of the remaining one-fourth of the assets, and if that be the case, the heirs of Mahomed Hossein may be called upon by the other heirs for contribution out of the 5-anna 9-pie share, which he retained under the compromise. If such should be the effect of the decree against Mulleeka for one-fourth of the debt, it will be because the compromise did not intend to release more than three-fourths of the assets. This is clear from the 11th paragraph of the compromise.

The defendant Mahomed Hossein jointly with the defendant Mulleeka appealed to the High Court, but having compromised the claim against him, he has not joined in the appeal to Her Majesty in Council. The consequence is that the decree of the High Court will stand against him, and he must avail himself of the compromise in such manner as he may be advised, should the plaintiffs endeavour to execute the decree against him. If he had appealed, he would have been entitled to have the suit disposed of in accordance with the compromise according to the provisions of s. 98 of Act VIII of 1859. In that case the decree must have been modified as against the defendant Mulleeka, and she cannot be deprived of the benefit of the compromise in consequence of Mahomed Hossein's not having appealed.

The decree of the Principal Sudder Ameen of the 28th September 1864, upon the trial after the remand, and the decree of the High Court of the 10th January 1866, by which that decree was upheld, ought to be reversed. Mr. King's share of the amount claimed has already been disposed of in consequence of his not having appealed against the first decision of the Principal Sudder Ameen of the 8th day of March 1862. Their Lordships are of opinion that the plaintiffs Jumeela and Summut Koonwraee are not entitled to recover from the defendant Mulleeka more than three-fourths of the one-fourth of the demand which has not been satisfied by the compromise, or, in other words, three-sixteenths of the whole amount claimed, but that they are entitled to a decree against her as representative of the said Syud Mahomed, deceased, for three-sixteenths of the amount sued for, and three-sixteenths of the costs incurred in the lower Courts prior to the appeal

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to the High Court, of the 13th February 1865, to be paid out of the property of the said Syud Mahomed, deceased; other than the 12-anna share, or three-fourths thereof, to which the said compromise related, and that the decree of the High Court, of the 31st day of May 1864, ought to be affirmed, but that, in consequence of the compromise, it should be modified as to the costs.

Considering also the mode in which so large an amount of dower was settled by the deceased without any writing, and the uncertainty which existed as to whether payment of it would amount to a due administration of assets, we think that the defendant Mulleeka was justified in resisting the suit and taking the opinion of the Court, and that she ought to be at liberty to retain her costs incurred in the several proceedings in this suit, and in the appeals to Her Majesty in Council, out of any assets of the said Syud Mahomed in her hands after satisfaction of the sums awarded against her in this suit; and that such costs take priority of all claims by inheritance to any portion of such assets.

Upon the whole their Lordships will humbly advise Her Majesty that the decree of the High Court of the 31st of May 1864 be affirmed, except so far as the defendant Mulleeka is thereby ordered to pay costs and interest thereon, and that the plaintiffs Jumeela and Summut Koonwaree do recover against the defendant Mulleeka, as representative of the late Syud Mahomed, deceased, three-sixteenths of the costs and interest awarded by the said last-mentioned decree, to be paid out of the assets of the late Syud Mahomed, deceased, other than that portion thereof to which the said compromise relates; that the judgment of the Principal Sudder Ameen of the 28th day of September 1864, and the judgment and decree of the High Court of the 10th of January 1866, so far as they relate to the defendant Mulleeka, be reversed with costs of the appeal to the High Court of the 13th of February 1865, and that it be decreed that the plaintiffs Jumeela and Summut Koonwaree do recover against the defendant Mulleek as representative of the late Syud Mahomed, deceased, three-sixteenths of the whole amount claimed in the suit, and three-

sixteenths of the costs incurred by the plaintiffs in the lower Court prior to the appeal to the High Court of the 13th of February 1865, the said portions of the amount claimed, and of the said costs, to be paid out of the property of the late Syud Mahomed, deceased, other than that portion thereof to which the said compromise relates, and that such decree be without prejudice to the rights, if any, which the defendant Mulleeka, or any of the heirs of the late Syud Mahomed, may have against the said defendant Mahomed Hossein in, consequence of the execution or satisfaction of the said decree and that the defendant Mulleeka be at liberty to retain her costs of all the proceedings in the suit, and also of the appeals to Her Majesty in Council, out of any assets of the said Syud Mahomed, deceased, in her hands, after satisfaction of the sums awarded against her in this suit in preference to all claims by inheritance to such assets.

And their Lordships order that each of the plaintiffs Jumeela and Summunt Koonwaree, and the defendant Mulleeka, do bear her own costs of the above-mentioned appeals to Her Majesty in Council.

Decree varied.

Agents for appellant: Messrs. J. H. and H. R. Henderson.

Agent for respondents: Mr. Wilson.

GOPEE LOLL, MANAGER OF THE ESTATE OF GOWSAWMY GIRDHAREEJEE
(PLAINTIFF) v. MUSSAMUT SREE CHUNDRAOLEE BUHOOJEE,
WIDOW OF SREE LUCHMUNJEE (DEFENDANT).

P. C.
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Nov. 30.

[On appeal from the High Court of Judicature, N. W. Provinces, Agra.]

Hindu Law—Adoption—Inheritance—Practice—Case on the Pleadings.

A second adoption cannot take place in the lifetime of the first adopted son.

Where the son of the son first adopted sued as heir of the second adopted son to obtain the property left by him, and the suit throughout was contested with respect to his claim as heir of that second adopted son, held, the plaintiff could not, on appeal, shift his ground and regard the second adopted son as a trespasser, and seek to recover the property on the ground of its having belonged to the ancestor.

* *Present*.—THE RIGHT HON'BLE SIR J. W. COLIVILE, SIR B. PEACOCK,
SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR L. PEEL.

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THIS was an appeal from a decree of the High Court at Agra, dated 11th April 1868, overruling a decree of the Principal Sudder Ameen of Agra of 24th December 1867.

The suit was brought by Girdhareejee, claiming as heir of one Luchmunjee, to recover from the respondent, as widow of Luchmunjee, temples and personal property belonging thereto, which he contended she had forfeited her right to on account of her having committed waste.

The case as stated in his plaint was, the one Damoodurjee was the owner of the property in dispute, and died leaving two widows, to whom he gave power to adopt sons; that one widow, Luchmee, adopted Gobindjee, the father of the plaintiff, and that the other, Charmuttee, subsequently adopted Luchmunjee, the husband of the respondent.

It is unnecessary for the purposed of this appeal to detail the defences set up by the respondent as to the plaintiff not having been duly adopted, and as to the property not having come to Luchmunjee by inheritance from his father: all that it is necessary to state is the title set up by the plaintiff's pleadings in which he claimed the right to succeed to the exclusion of the respondent (as a widow committing waste) on the ground that he, as the son of the first adopted son, was entitled as heir of Luchmunjee, as also an adopted son.

The father Damoodurjee died in 1825, and Luchmunjee, whatever his title was, had held possession for many years.

The High Court, without going into the question of the defendant's title, held that the plaintiff established no right of inheritance to Luchmunjee, as there could not be two adopted sons. They also considered the questions of fact raised as to the adoption of the plaintiff; but their findings on these points are irrelevant to the present case.

The plaintiff appealed to Her Majesty in Council.

Mr. *Forsyth*, Q.C., and Mr. *Pontifex* for the appellant contended (in addition to arguing as to other points which are not alluded to by the Judicial Committee and could not arise under their finding on the points of law) that the double adoption was good, and that all the history of the family showed

that Luchmunjee's adoption had been recognized as valid, and that the widow, who had relied upon her husband having been duly adopted, could not be heard to dispute the adoption. They also contended that, as the property had belonged to Damoodurjee, then, if Luchmunjee had not been properly adopted, the appellant, as Damoodurjee's heir, was entitled.

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Mr. *Leith*, Mr. *Cowie*, and Mr. *Campbell* for the respondent contended that the question as to invalidity of a double adoption was concluded by *Rungama v. Atchama* (1); and if a second adoption by Damoodurjee would have been bad during the life of another adopted son, a second adoption by his widow, who in fact derived authority solely from the husband, would be equally bad. There was here no estoppel; there was a claim that Luchmunjee was legally adopted; but if so, the plaintiff's father could not have been. All statements as to the adoption of Luchmunjee were accompanied by assertions as to the plaintiff's father having no claim. The whole case for the plaintiff on the pleadings being founded on a claim to succession to Luchmunjee, he was not now entitled to change his position and deny Luchmunjee being in as of right, and to claim as heir of Damoodurjee.

Mr. *Forsyth* in reply.—Even if the case be not put so high as estoppel, there have been such admissions, and the defence taken has been such, as to entitle the plaintiff to substantial relief; and whether he claims as heir of Damoodurjee or not, the defendant could not be prejudiced, as no further evidence would have been required if the case had been originally framed for that relief.

Their LORDSHIPS delivered the following judgment:—

This was a suit brought to recover possession of a temple and certain jewels and valuables held therewith. The plaintiff claimed as heir of one Luchmunjee. He endeavored to prove his heirship in this way. He asserted that his grandfather Damoodurjee had two wives, Luchmee and Charmutee; that, shortly before his death, he gave a power to his wives to adopt

(1) 4 Moore's I. A., 1.

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two sons ; that, after his death, his first widow Luchmee adopted Gobindjee, the father of the plaintiff ; that some four years afterwards, the second widow Charmuttee adopted Luchmunjee, through whom the plaintiff claims. The plaintiff asserts that, on the death of Luchmunjee, who, according to his case, was his uncle, he became the heir to Luchmunjee, who was in possession of the property. He admits that the defendant, the widow of Luchmunjee, had a life-interest in the property, but he alleges that she had forfeited that life-interest by committing waste.

The Principal Sudder Ameen found in effect that the plaintiff had proved the whole of his case. The High Court reversed the decision of the Principal Sudder Ameen : they expressed themselves by no means satisfied that the defendant had forfeited the property by committing waste ; but they deemed it unnecessary to decide this question, inasmuch as they came to the conclusion that the plaintiff had failed to prove his heirship to Luchmunjee. They were by no means satisfied that the plaintiff proved all the facts on which he relied : but they came to the conclusion that assuming all those facts to be proved, as the plaintiff alleged them, still in point of law his case failed for this reason, that, according to Hindu law, there cannot be two valid successive adoptions, and that the first widow having adopted a son Gobindjee, the second widow could not, while Gobindjee was alive, make another valid adoption.

The question of successive adoptions was argued very elaborately, and very carefully considered in the case of *Rungama v. Atchama* (1), and since the decision of that case, whatever doubts may have been entertained on the question before, it must be considered as settled law that a man cannot, while he has an adopted son living, adopt another son. And in their Lordships' opinion it follows on principle that a man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime ; and that inasmuch as he, Damoodurjee, could not, one adopted son being living, adopt another, his second widow Charmuttee could not,

(1) 4 Moore's I. A., 1.

by virtue of any authority delegated from him, adopt a son while an adopted son was still living.

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Their Lordships therefore concur with the judgment of the High Court, which amounts to this, that assuming all the plaintiff's facts, as he alleges them in his own favor, still that in point of law the second adoption was invalid, and that consequently there was no relationship between him and the second adopted son Luchmunjee under whom he claims.

That being so, their Lordships do not think it necessary to give an opinion as to whether the facts on which the plaintiff relies have been substantiated or not. Assuming them to have been substantiated, his case in point of law fails.

¶ It has been argued on the part of the appellant that the defendant in this case is estopped from setting up the true facts of the case, or even asserting the law in her favor, inasmuch as she has represented in former suits and in various ways, by letters and by her actions, the Luchmunjee was the adopted son of Damoodurjee adopted by Damoodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee, or the defendant, on any matter of fact. She is alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that she has arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties.

It may further be observed that, if Luchmunjee's statement is to be taken, it must be taken as a whole; and what he asserts is that he was validly adopted. But if he was validly adopted it follows that the plaintiff was invalidly adopted; and therefore in this view of the case it appears to their Lordships that no reliance can be placed upon this question of estoppel.

It has indeed been further argued that, even putting it not so high as estoppel, still the plaintiff has been misled, by various representations made by the defendant, into framing his suit as

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it is now framed. If that were so, it would not empower their Lordships to depart from the rule which has always prevailed that a man must recover according to his allegations and his proofs. It would not enable their Lordships to allow (as the appellant asks them to allow) an entirely new case to be now brought forward before them, which is not even set up or hinted at in the plaint.

The new case suggested appears to be that, assuming an invalid adoption of Luchmunjee, and treating Luchmunjee as a mere trespasser, still the plaintiff could recover by proof of his title from Damoodurjee. Whether he has such a case or not, their Lordships do not think it necessary to decide, but they feel themselves bound to say that that case cannot be gone into, inasmuch as it has not been set up in the plaint. Their Lordships do not desire to construe plaints with any extreme strictness or technicality, but it would manifestly be extremely inconvenient, and certainly contrary to their practice, to allow a case to be raised here which is entirely different from the one which has been previously insisted upon.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and ought to be affirmed. Their Lordships understand the High Court simply to have ruled that the plaintiffs had failed to prove the title on which they sued, that the Principal Sudder Ameen's decree ought therefore to be reversed, and the suit dismissed with costs. But inasmuch as the formal decree, which simply orders that the appeal be decreed with costs, and the decision of the Principal Sudder Ameen reversed, may hereafter lead to some doubt as to what was really decided by the High Court, their Lordships think that the formal decree should be varied by ordering that the decision of the Principal Sudder Ameen be reversed, and the suit dismissed with costs in both Courts; and their Lordships will humbly advise Her Majesty to this effect. The appellants must pay the costs of this appeal.

Appeal dismissed.

Agents for appellant : Messrs. *Tucker, New, and Langdale.*

Agent for respondent : Mr. *Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Phear and Mr. Justice Ainslie.

RAJAH RAM NARAIN SINGH (PLAINTIFF) v. PERTUM SINGH AND
OTHERS (DEFENDANTS). *

1873
June. 20.

*Hindu Law—Impartible Raj—Mitakshara Law—Alienation by Father—
Consent of Son.*

Where, in a part of the country the general law of which is the Mitakshara, a custom exists, with regard to ancestral immoveable property, that it is not impartible among the members of the joint family, but descends from the father to his eldest son, the father cannot alienate such property without the concurrence of his son, unless such alienation is justified by family necessity. See also 13 B.L.R 451.

THIS was a suit for khas possession of Ruttunpore and other manzas in Pergunna Gundhore, after setting aside a bond, a letter of assignment, and a potta for a term of eleven years, executed by Rajah Mohendernath Singh, the father of the plaintiff, on the ground that the property in dispute was the ancestral property of the plaintiff, that, according to the Mitakshara law and the custom of primogeniture which was prevalent in the family, the plaintiff's father had no right to alienate; and that therefore the plaintiff, as the eldest son and born during the lifetime of his father, was entitled to recover possession. The plaintiff stated that the plaintiff's father was incapable of managing his affairs; that the defendants, Pertum Singh and Nawab Singh, in collusion with one Gujjadhur, who had great influence over the plaintiff's father, obtained from him for a nominal consideration of Rs. 10,000, by way of *zur-i-peshgi*, a potta upon an inadequate jumma of the land in dispute, in favor of Radhay Singh and Mudhoo Singh, the grandsons of the said Pertum Singh, and Nuckhoo Singh and Mahal Singh, the sons of the said Nawab Singh, a bond in their own favor for securing the principal sum with interest, and a letter of assignment in favor of

* Regular Appeal, No. 40 of 1872, from a decree of the Judge of Bhaugulpore, dated the 11th October 1872.

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the lessees, Radhay Singh and others, assigning the rent towards payment of the interest due on the bond ; that according to the custom of the country, the three deeds were several parts of one and the same mortgage transaction ; that the debt was incurred without legal necessity, and therefore the plaintiff's father had no power to alienate immoveable property ; that the property in dispute formed portion of an impartible raj ; and that the plaintiff was entitled to recover possession thereof.

The defendants Radhay Singh and others, the lessees, stated (*inter alia*) in defence, that the potta, dated 21st Asar 1268 F.S. (13th July 1861), was for a limited term of years, and not in the nature of a *zur-i-peshgi* lease ; that the bond, dated 22nd Asar 1268 F.S. (14th July 1861), did not contain any condition for the hypothecation of the property in dispute ; and that the potta was granted in good faith for the better management of the zemindari and for personal benefit.

The defendants Pertum Singh and Nawab Singh stated (*inter alia*) that the plaint disclosed no cause of action ; that the bond was executed by the plaintiff's father for a good consideration ; that the other defendants had taken the lease for their own benefit ; that the lease was executed previous to the bond, and not on the same day ; that these transactions were separate and independent ; and that the lease was not a *zur-i-peshgi* one.

The Subordinate Judge found that the lease, bond, and letter of assignment formed parts of the same transaction ; that the lease was a *zur-i-peshgi* one but was not such a transfer of ancestral property by the father, as under the Mitakshara law would entitle the son to sue for cancellation thereof, and that the loan under the bond was a *bond fide* transaction. He held that the bond and lease could not be interfered with. He accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Mr. Woodroffe (Baboos Romesh Chunder Mitter and Boodh Sen Singh with him) for the appellant.

Mr. C. Gregory for the respondents Radhay Singh and others, the lessees.

Baboo *Chunder Madhub Ghose* and *Nilmadub Sen* for the respondents *Pertum Singh* and *Nawab Singh*.

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Mr. *Woodroffe* contended that there was not sufficient evidence to show that there was legal necessity for the loan. The rent reserved by the *ticca* lease was inadequate. The property in dispute formed portion of an impartible raj. The father had no right to create an incumbrance on the estate. There is no dispute as to its being an impartible raj. The learned Counsel cited *Maharani Hiranath Koer v. Baboo Ramnarayan Singh* (1), *Katama Natchier v. The Rajah of Shivagunga* (2), *Nilkristo Deb Barmano v. Bir Chandra Thakur* (3), and *Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee* (4).

Mr. *O. Gregory* contended that the bond did not create any incumbrance on immoveable property. The *ticca* lease was a separate transaction. There was acquiescence on the part of the plaintiff. His cause of action arose when Radhay Singh and others took possession of the property. He cannot now contest the validity of the lease. The case of *Maharani Hiranath Koer v. Baboo Ramnarayan Singh* (1) is not applicable to the present suit. The property in dispute not being a joint family property, the plaintiff is bound to show that his father could not alienate.

Baboo *Chunder Madhub Ghose* contended that there was no cause of action against *Pertum Singh* and *Nawab Singh*. The plaintiff has failed to prove that the transaction was a nominal one:

Mr. *Woodroffe*, in reply, cited *Stree Rajah Yaunmula Venkayamah v. Stree Rajah Yaunmula Boochia Vankondora* (5).

The judgment of the Court was delivered by

PHEAR, J.—With regard to the principal issue of fact in this case, we concur in the finding of the lower Court. It appears

(1) 9 B. L. R., 274.

(2) 9 Moore's I. A., 539.

(3) 3 B. L. R., P. C., 13; S. C., 12.

Moore's I. A., 523.

(4) 12 Moore's I. A., 1.

(5) 13 Moore's I. A., 333.

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to us that the granting of the *ticca* potta, and the execution of the bond, were but two steps in one transaction by which the plaintiff's father secured to the bond-holder at least the repayment of the interest stipulated for in the bond, by means of the rents reserved in the *ticca* lease. It is almost impossible, I think, to take any other view of the matter. The story set up by the defendant, amounting really to a statement on the part of the bond-holder and the *ticcadars*, relatives on intimate terms of association with each other as they were, that each was quite ignorant of the dealing of the other with the plaintiff's father, is entirely unworthy of credit. And then there is the very significant fact that the period of the lease just exceeds the period of maturity of the bond-debt, if I may use the term, *i.e.*, by two or three months only : eleven years was the period in one case, and ten years and three-fourths in the other. We agree with the Subordinate Judge that this was one transaction, and we think that it has the character of a mortgage transaction to the extent which I have mentioned. It was, therefore, clearly, for the period during which the *ticca* potta was expressed to endure, an incumbrance upon the estate.

We also think, on the evidence which has been brought before us, that the *ticca* rent reserved by the potta was, as the plaintiff terms it, an inadequate rent. The jumabandi papers proved by the plaintiff's witness, the *patwari*, coupled with his own testimony, is *primâ facie* evidence at any rate, going to show that the assets of the property which was the subject of the *ticca* lease amounted to somewhere about Rs. 4,000 per annum, during pretty nearly the whole period, and this evidence has not been met by the defendants in any way whatever. It is obvious that, if this evidence was untrue, the defendants had the very best possible means in their power of showing that it was so. The *ticcadars* for some nine years previous to suit had been the actual receivers of the rents and profits of this estate. They could have shown to a pice what it was that they realized during the whole of that period. They have in truth given no evidence as to the amount of rents and profits which they realized. To my mind the conclusion is inevitable that the case of the plaintiff in this respect is a true one. I therefore think, not only that

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the original transaction was a transaction having the character of a mortgage, a transaction which had for its purpose at any rate to secure to the bond-holder the payment of the interest due on his bond, but also that the *ticca* itself was a grant of a very beneficial character to the grantee ; so that the grant, independently of its forming part of the mortgage transaction, would be an incumbrance upon the estate. In other words the incumbrance effected by the assignment of the *ticca* rent to secure the payment of the interest on the bond was increased by reason of the inadequacy of that rent. With this view of the facts of the case, it remains to be considered whether the plaintiff had a right to ask for possession and enjoyment of the property free of these incumbrances which his father had put upon it.

Thus we come to the question whether the father held and enjoyed the property with the incidental power of alienating or incumbering it as against his successors.

It is perhaps somewhat unfortunate that no issue of fact was distinctly raised in the Court below for the purpose of ascertaining the nature of the father's proprietary right in this property. But we have it asserted in the plaint, and not contradicted by the defendants, that the property in question had descended to the plaintiff's father from his father. It was therefore in the hands of the plaintiff's father an ancestral property as distinguished from a self-acquired property ; and its incidents and the rules which would govern its descent, would therefore be those prescribed by the general law of the land in that part of the country, namely, by the Mitakshara law, excepting so far as that might be controlled or overridden by the operation of an established custom or other special authority. And in the absence of any such exceptional disturbing force, I need hardly say that one of the incidents of ancestral property in the hands of the father (as I have just observed this property was) would be that he would have no power of alienation or of incumbering as against any members of the family who were joint with him in respect of his property.

Now, admittedly, the present plaintiff was born during the lifetime of his father and while the father had this property ; and

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therefore by the Mitakshara law, if it operated uncontrolled' the plaintiff immediately became joined with his father as regards right to his ancestral property, and any alienation or incumbrance which the father at any time should make without his concurrence would be void as against him, unless it was justified by family necessity.

In this way I think we have reached a point in the case, at which we must enquire whether there has been any established custom or any other established authority proved such as had the effect of overruling the general law, the Mitakshara law, which otherwise would govern the incidents and descents of this property.

Some such custom or authority has been made out to a certain extent, or rather we must take it that there is in this case something of the kind active. For the plaintiff in his plaint asserts that this property is impartible amongst the members of the joint family, and descends from the hands of the father to those of the eldest son, if he has sons, and so on : in other words that it is not in any form divided or distributed in possession amongst the members of the joint family. This must be of course under the coercion, and as the effect, of some authority external to the Mitakshara law. The defendant does not deny this, and consequently we must take that as a fact in the case. But that fact does not go further than the plaintiff has asserted it: it goes no further than the result which I have mentioned, namely, that this joint family property is not partible amongst members of the joint family, but goes on the decease of the last holder to the hands of the elder member in lineal descent of the joint family. If then the custom or authority has this effect, and so far controls the general law, but does not go further, there must still remain the other incidents which I before drew attention to, namely, one amongst others, that the holder of the property cannot alienate any portion of it, excepting for a family necessity, without the consent of all the members of the joint family. It seems to me that in arriving at this position, we have the authority of the Privy Council expressed in several judgments; in particular it is expressed in the judgment in the case of *Stree Rajah Yaunmala*

Venkayamah v. Stree Rajah Yaunmula Boochia Vankondora (1) on which Mr. Woodroffe very greatly relied yesterday. Another case, in which the like doctrine has been lately enunciated by a judgment of this Court, is *Maharani Hiranath Koer v. Baboo Ramnarayan Singh* (2). One of the learned Judges of this Court who pronounced an opinion in that matter differed in regard to the final result from the other members of the Court: but it seems to me upon the best consideration which I have been able to give to all the judgments reported in that case that in reality he did not materially differ from the other Judges in his view of the principles which ought to govern the case. He appears to have been of opinion that the property which was there the subject of suit did exist in the condition of separate property in the hands of every successive taker. It is possible, I think, that the facts and circumstances of the enjoyment of a particular subject of property may be such as to bring about this result, and probably a peculiar state of things in this respect will account for the special character of the judgment which was given by the Privy Council in the *Tipperah* case (2). There were some expressions thrown out by their Lordships in the Privy Council in the *Tipperah* case (2) and by some of the learned Judges who gave judgment in the case of *Maharani Hiranath Koer v. Baboo Ramnarayan Singh* (3) which seem to imply that there is a different law of descent in the case of what is termed a separate property, from the law of descent in the case of joint property. I do not myself readily accept that view. The distinction between joint property and separate property under the Mittakshara law appears to me to be simply of a temporary, not of an abiding, character. Property is joint when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs only to one member of a joint family alone, and not to the others jointly with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal

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(1) 13 Moore's I. A., 333.

(2) 3 B. L. R., P. C., 13; S. C., 12 Moore's I. A., 523.

(3) 9 B. L. R. 274.

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of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property—the property of several persons united together as a joint family with regard to it—the property of a new joint family springing from a new root, and it continues to go down by one rule of descent only. As I understand the matter, there is substantially no different rule prevailing in the one case, and in the other. It is simply the occurrence of a fresh starting point for a new joint family which makes the distinction between the two cases. While the joint family endures, there is, strictly speaking, no question as to succession to the property. The joint family is a corporation in the sense of having a continuous existence notwithstanding the death of individual members; and it is now settled that under the Mitakshara law no individual member of the family has any specific interest in the property, or the power of creating any for himself, independently of the other members: he has only a right to insist upon a partition being effected by all. But by the nature of the case, the joint family must commence, and also must end, when it does end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family. Thus the Mitakshara law itself does nothing to keep property in the condition of being separate property throughout a series of takers, and indeed is hostile to such a state of things. If, however, in any given case property is so situated that it does pass from one taker to another taker, just in the same condition as if it were the separate self-acquired property of each of them personally, independently of the family element, then this result I conceive can only be brought about, if at all, by the operation of some established custom or authority controlling the general Mitakshara law. The Privy Council appear to have been of opinion in the *Tipperah* case (1) to which I have already alluded that some result of this kind arose

(1) 3 B. L. R., P. C., 13; S.C., 12 Moore's I. A., 523.

out of the state of facts before them. But in the case which is now before us, and in the other cases in this Court to which I have just referred, there is an entire absence from the facts of any authority or custom, if any there could be, which should have the effect of making the property separate property, and not joint family property, as it passess into the hands of the successive takers. It appears to me then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its pertibility amongst the existing joint members of the family; and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards his property, to alienate or incumber the estate, excepting upon a justification of a family necessity. No such ground justifying the father's deeds of 21st and 22nd Asar (13th and 14th July) has been even attempted to be proved.

The result to my mind is that the plaintiff is entitled to have it declared that the two deeds, the *ticca potta* and the bond of the 21st and 22nd of Asar (13th and 14th July), had the effect of placing an incumbrance on the estate, and that the plaintiff was entitled, to have possession of the property at the time of his father's death free from that incumbrance. The plaintiff must have his costs in both the Courts.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr Justice Pontifex.
KEDERNATH DUTT AND ANOTHER (TWO OF THE DEFENDANTS) v.
SHAMLOLL KHETTRY AND OTHERS (PLAINTIFFS).

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 March 27 &
 June 9.

Equitable Mortgage—Unregistered Document—Evidence Act (1 of 1872), s.91—Registration Act (VIII of 1871), s.17.

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The defendant deposited certain title-deeds with the plaintiff as security for the repayment of Rs. 1,200 lent him by the plaintiff at the time when the deposit was made. On the evening of the same day, the defendant by way of further

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security, gave to the plaintiff a promissory note for the amount of the loan, and, endorsed thereon the following memorandum:—"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with 'the plaintiff' as a collateral security by way of equitable mortgage title-deeds of my property, &c." Held that the memorandum did not require registration.

The equitable mortgage was complete without the memorandum, the memorandum was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred.

APPEAL from the judgment and decree of Macpherson, J., dated 5th February 1873. The suit was brought for a declaration of the plaintiff's right as equitable mortgage of certain premises situate at No. 11 in Fukeer Chand Mitter's Street at Mirzapore in Calcutta, for an account, and for foreclosure or sale on default in payment of the amount which might be found to be due to the plaintiff under the mortgage. The plaintiff stated in his plaint that he had on the 29th of March 1871 lent to Woomachurn Banerjee, one of the defendants, Rs. 1,200; that Woomachurn Banerjee then and there deposited with him, as security for the repayment of the loan and by way of equitable mortgage, the title-deeds of the property in dispute and further gave him a promissory note for the amount; that at the time of making the promissory note, Woomachurn Banerjee endorsed thereupon the following memorandum:—

"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with Baboo Shamloll Khetry, as a collateral security by way of equitable mortgage, title-deeds of my property situate at No. 11 in Fukeer Chand Mitter's Street at Mirzapore in Calcutta;" that since the time of the deposit, the title-deeds had remained in his, the plaintiff's hands; that in execution of a decree against Woomachurn Banerjee, the property in suit was put up for sale by the Sheriff of Calcutta, and purchased on the 28th November 1872 by the defendants Kedar-nath Dutt and Madhub Chunder Bose, who had full notice of the plaintiff's claim, he having given notice of his claim

in a letter written on the 25th November 1872 by his attorney to the Sheriff. In this letter the attorney wrote :—

„I have no objection to show the security to any intending purchaser who will call at my office.”

The defendants, the purchasers, denied all knowledge of the alleged equitable mortgage.

The plaintiff stated in evidence that he paid the money to Woomachurn Banerjee, and received the title-deeds from him at 8 o'clock in the morning of the 29th March 1871 ; that the promissory note was not given till the evening of the same day ; and it was contended on his behalf that the mortgage transaction was complete in the morning.

The following was the judgment of

MACPHERSON, J.—I am of opinion the transaction was complete in the morning. The money was paid, and the equitable mortgage was completed then on the deeds being deposited. It was none the less complete because the defendant Woomachurn Banerjee agreed to return and give a writing, and did return and do so.

His Lordship made a decree in the plaintiff's favor of a sale of the property.

The defendants Kedarnath Dutt and Madhub Chunder Bose, the purchasers at the execution-sale, appealed on the following grounds (amongst others), *viz.*, that the terms of the equitable mortgage were contained in the memorandum endorsed on the promissory note, and that parol evidence of the terms of the agreement ought not to have been admitted ; and that the memorandum, being unstamped and unregistered, was not admissible in evidence.

Mr. Kennedy and Mr. Evans for the appellants.

Mr. Montrion and Mr. Branson for the respondent Shamloll Khettry.

Mr. Kennedy.—The terms of the contract of deposit having been reduced into writing in the memorandum on the note, that document was the only admissible evidence of the terms of the

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contract; Act I of 1872, s. 91. The deposit of the title-deeds was only one of a series of acts which were completed when the promissory note was made, endorsed, and delivered. The words of the memorandum are:—"I hereby deposit." Again, in the notice to the Sheriff, the plaintiff speaks of his mortgage as "dated the 29th March 1871," and says:—"I have no objection to show the security," thereby indicating the memorandum as containing the terms of the agreement. By claiming interest at 24 per cent., the plaintiff clearly points to the promissory note as embodying the contract. [PONTIFEX, J.—The plaintiff might have claimed interest, although there had been no memorandum of the deposit—*Tuckley v. Thompson* (1).] Here there was a memorandum stating the terms of the deposit, and it is submitted that it ought to have been stamped and registered; see *Neve v. Pennell* (2), where it was held that an agreement for a deposit of title-deeds of lands in Middlesex to secure a payment, with a provision that a legal mortgage should be given upon demand, was a document requiring registration under 7 Anne, c. 20. [PONTIFEX, J., cited *Meek v. Bayliss* (3) as showing that, where title-deeds are deposited by way of equitable mortgage, a memorandum, stating the purpose for which they are deposited, is not an agreement for a mortgage, and need not be stamped.] The learned Counsel also referred to *Fati Chand Sahu v. Lilamber Singh Das* (4) and *Dwarkanath Mitter v. S. M. Sarat Kumari Dasi* (5).

Mr. Montriou for the respondent.—Macpherson, J., found, and the evidence shows, that the mortgage was completed in the morning; the subsequent writing of the memorandum cannot alter the nature of the transaction, or cut down the effect of the deposit. In *Dwarkanath Mitter v. S. M. Sarat Kumari Dasi* (5), the letter was sent with the title-deeds, whereas the memorandum in this case was not written till the evening. The Evidence Act does not provide that, where a transaction is once complete, the fact of its being afterwards put into

(1) 1 J. & H., 126.

(2) 2 H. & M., 170.

(3) 31 L. J., Ch., 448.

(4) 9 B. L. R., 433.

(5) 7 B. L. R., 55.

writing will avoid what has previously taken place, at all events when the writing does not accurately describe what took place. The words "I hereby deposit" contradict the proved facts, and must, therefore, be read as "I have deposited." It must not be forgotten that the document was written by a Bengali in a foreign language.

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Mr. *Kennedy* in reply.

The judgment of the Court was delivered by

Couch, C.J.—This is a suit in which the plaintiff prayed that it might be declared that he held a valid equitable mortgage on certain premises mentioned in the plaint, and that an account might be taken of what was due and owing to him as equitable mortgagee in respect of a loan made by him to the defendant Woomachurn Banerjee. The premises upon which he asked it might be declared that he had an equitable mortgage belonged to Woomachurn Banerjee, and had been purchased by the defendants Kedarnath Dutt and Madhub Chunder Bose under an execution against Woomachurn Banerjee, and it is said, with notice at the time of the sale, of the claim of the plaintiff.

The evidence of the plaintiff, who was the only witness examined, was that he made an advance of money to Woomachurn Banerjee on a deposit of the title-deeds of property belonging to him situated in Mirzapore; that Woomachurn Banerjee having been to him several times before, the plaintiff told him if he could give him a deposit of title-deeds, or security of that sort, he could advance him the money; that Woomachurn said he had landed property and the title-deeds of it, and would give them to him. The witness then said:—"He" (Woomachurn) "continued, 'I will place them as deposit with you, and also give you a note of hand.' He brought me title-deeds on that same day, 16th Chitra 1277 (29th March 1871), not quite two years ago. He brought me the title-deeds at 8 o'clock in the morning. That was the occasion he received and took the money away having brought the deeds. Before that a *pucca* arrangement had been come to between me and him. It was not then reduced into writing. A writing

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was made when I paid the money that same day at 6 o'clock in the evening. I gave him the money at 8 o'clock in the morning actually before the writing took place. I got the title-deeds from him at 8 o'clock in the morning before I gave the money." The year 1271 in the note of the evidence must be a mistake, as that would be nine years ago. The time is shown by the promissory note to be the 29th of March 1871. He then said that he saw him again at 5 o'clock in the evening, and he then gave him a document which bears his signature. It is set out in the plaint, and is a promissory note dated the 29th of March 1871, whereby Woodmachurn Banerjee promised "to pay to Shamloll Khettry or order, the sum of Rs. 1,200, with interest at the rate of 24 per cent. per annum, for value received in cash." It bears an indorsement in these words [*reads* (1)].

Macpherson, J., by whom the case was tried, gave a very short judgment, saying he was of opinion that the transaction was complete in the morning. He says [*reads* (2)].

We do not entirely agree in the view which the learned Judge took of the evidence of the plaintiff. We rather think that the transaction was not completed until the promissory note was given, and that the plaintiff's evidence to the contrary is probably not true; but, in the view we take of the question, it is not material to determine whether there was a complete equitable mortgage before the promissory note was given, or whether that was the completion of the transaction.

It was objected that the memorandum, which I have read, ought to have been registered under the Indian Registration Act of 1866; and as it had not been, it could not be received in evidence and consequently the plaintiff could not establish his equitable mortgage. The words of the Act upon which the objection is founded are in s. 17, the 2nd clause of which enumerates, amongst the instruments which shall be registered, "instruments, other than an instrument of gift, which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property." S. 21 of the same Act requires that no

(1) *Ante*, p. 406.

(2) *Ante*, p. 407.

instrument relating to immoveable property shall be accepted for registration unless it shall contain a description of the property sufficient to indentify it. In fact, if this memorandum had been presented for registration, it must have been rejected. Although the transaction is of a description which is usual with merchants when an immediate advance of money is required, if the charge upon the property is made by a written instrument, care must be taken to describe it accurately. It is not unlikely that many instruments may be defective on that account. But that cannot be allowed to affect the construction of the Act. If this instrument came within s. 17, it was the duty of the parties to see that it contained what s. 21 requires. Is the memorandum which I have read an instrument within the meaning of the words in s. 17? Was there not a valid equitable mortgage independently of it?

The nature of an equitable mortgage is well known. But as we are discussing the matter with reference to the Registration Act, it may be well to refer to what Lord Eldon says about it. In *Ex parte Wright* (1) he says that the deposit of title-deeds is "evidence of an agreement for a mortgage, and an equitable title to a mortgage," that is, the title created by the agreement is, in a Court of Equity, "as good as a legal title." Hence the way in which Courts of Equity gave effect to a deposit of title-deeds. It is true that this doctrine has been questioned by some Judges, but it has been upon a ground which would not be applicable to a case like the present. It would not be applicable to a great majority of transactions in India, the ground being that it appeared to be opposed to the Statute of Frauds which required a writing where any interest in land was transferred; and although objections have been made to the doctrine on that account, it has been constantly acted upon in the Courts in England, and must be considered as fully established, as Lord Abinger said in *Keys v. Williams* (2):—"It appears to have arisen from the necessity of the case. It may, however, in many cases, operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a sudden, before

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1) V es., 255, see 258.

(2) 3 Y. & C., 55, see 60 and 61.

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an opportunity can be afforded of investigating the title-deeds and preparing the mortgage. Expediency therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute." Many cases in the English Courts might be referred to, as showing how the doctrine is acted upon. But it is enough to notice the case which was quoted to us in the course of the argument—*Neve v. Pennell* (1)—where, as to one of the sums of money claimed, the £3,000 which was an advance made at the time the title-deeds were deposited, no question was raised as to the validity of the mortgage. The question in the case was raised with reference to the sum of £4,000, which was subsequently advanced, and as to which it was necessary to have some writing in order to show that the title-deeds, which had been deposited and were in the hands of the equitable mortgagee, were to be security for that sum. The case shows how entirely the doctrine of equitable mortgage was treated as established. Then what we have to consider is, did the memorandum, which was endorsed on the promissory note, make any difference in the transaction ?

The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within s. 17 of the Registration Act. But it was not a writing of that character. As I have said, the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title-deeds. the promissory note, whether given either at the same time or some hours afterwards, in pursuance of the understanding between the parties, was evidence of the

(1) 2 H. & M., 170.

terms upon which the loan was made, viz., that the interest should be at the rate of 24 per cent. But as regards the contract between the parties, if there had been no memorandum at all on the promissory note, there would have been a complete equitable mortgage. When we consider what the memorandum is, we find it is not the contract for the mortgage,—not the agreement to give a mortgage for the Rs. 1,200, but nothing more than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given. It is not by the memorandum that the Court takes the agreement for the mortgage to be proved, but by the deposit of the deeds, and this is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced. That this is the nature of such a memorandum as this appears from a decision of the Court of Queen's Bench in *Blackwell v. McNaughtan* (1). Of course, I refer to this decision more as an illustration of what I have been stating than as an authority which binds us. We are to determine what is the law under the Registration Act. But this decision illustrates what I have been saying about this memorandum. The question arose there not upon a Registration Act, but on the Stamp Act; but the reasoning of the Court is equally applicable. The action was upon a contract to redeliver, on request, wine which had been placed in the defendant's care. The plaintiffs offered in evidence a writing signed by the defendant, which was in substance as follows:—"This is to certify that Mr. McNaughtan has in his cellar, belonging to Mrs. Hartly, that is paid for, twelve dozen of portwine. March 5th, 1823." It was objected that this writing was not admissible without a stamp: The late Chief Baron, Sir Frederick Pollock, in moving for a new trial, argued that it was evidence of a contract, and ought therefore to have had an agreement stamp. Lord Denman, the Judge who had tried the case, said:—"I thought the certificate was not proof of a contract, but proof of an

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(1) 1 Q. B., 127.

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independent fact from which, among others, a contract might be inferred, if the case were sufficiently made out." Coleridge, J., said :—" This writing was merely evidence of a fact from which the plaintiffs sought to infer a contract," which is precisely the case here. The result was that the Court refused the rule for a new trial, and upheld the decision of Lord Denman, who read the judgment of Lord Tenterden in *Mullett v. Huchison* (1).

On the ground therefore that this was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred, I think it does not come within the description of documents in the 17th section of the Registration Act.

A decision of Phear, J., in the case of *Dwarkanath Mitter v. S. M. Sarat Kumari Dasi* (2) was quoted, which I think is distinguishable from the present case. In that case the facts appear to have been similar to what they were in *Neve v. Pennell* (3) in regard to the sum of Rs. 4,000. The letter which Phear, J., held to require registration, as being a document creating a charge on land, was written after the debt had been incurred and was sent with the title-deeds. There was not in that case that which was evidence of an agreement to give a mortgage, namely, the loan of the money accompanied by the deposit of the title-deeds. Without some letter or verbal communication, there would have been nothing to attach the debt which had been incurred to the deposit of the deeds. It seems to me that the decision is distinguishable from the present case, and that, for the reasons I have given, we ought to hold that the decision of Macpherson, J., is right, and that this appeal should be dismissed. The appeal is dismissed with costs on scale 2.

Appeal dismissed.

Attorney for the appellants: Baboo *Troyluckonath Roy*.

Attorneys for the respondents: Mr. *Pearson* and Messrs. *Hume* and *Dutt*.

(1) 7 B. & C., 639.

(2) 7 B. L. R., 55.

(3) 2 H. & M., 170.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Phear.

**WILLIAMSON BROTHERS (PLAINTIFFS) v. ABAB ISMAİL KHAN
(DEFENDANT).**

Small Cause Court Reference—Case referred at request of Party—Non-appearance of such Party before High Court—Costs.

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August 11.

Where a case is referred by the Small Cause Court, for the opinion of the High Court, at the request of one of the parties, and such party does not appear in the High Court, the decision must be given against him, whether security has been given for the costs of the reference and the amount of the judgment or not, and he must pay the costs of the reference.

THIS was a reference by the first Judge of the Calcutta Small Cause Court, under s. 7, Act XXVI of 1864. The case was referred at the request of the defendant, who duly deposited a sum sufficient to meet the costs of the reference and the amount of the judgment, but did not appear in the High Court.

Mr. *Phillips* for the plaintiffs was about to address the Court when he was stopped.

The judgment of the Court was delivered by

COUCH, C.J.—We are of opinion that, where a party to the suit requests the reservation of a question by the Small Cause Court for the opinion of this Court, and it is not reserved because the Judges entertain any doubts, if he does not appear in this Court, the decision must be given against him, whether security has been given for the costs of the reference and the amount of the judgment or not. The Court is not bound to act as Counsel for him. The judgment in this case will be for the plaintiffs with an order for the costs of reserving the case for the opinion of this Court in the same terms as in the case of *Dissent v. The Justices of the Peace for the Town of Calcutta* (1), viz., the costs of reserving the question and stating it for the opinion of this Court and otherwise arising thereout or connected therewith.

Attorneys for the plaintiffs: Messrs. *Berners, Sanderson, and Upton*.

Attorney for the defendant: Mr. *Pittar*.

APPELLATE CIVIL.

1873
June 18.

Before Mr. Justice Phear and Mr. Justice Ainslie.

MUTTEERAM KOWAR (DEFENDANT) v. GOPAUL SAHOO (PLAINTIFF).*

*Hindu Law—Widow's power to alienate her Husband's Property—
Pilgrimage to Gya—Sradh—Necessity—Spiritual Purposes.*

Expenses incurred by a Hindu widow for a pilgrimage to Gya and for the performance of *sradh* are legitimate expenses for which she can alienate her husband's property (1).

Where the amount expended was Rs. 1,700, and the property was sold for Rs. 4,000, held, in a suit by the heir against the purchaser to have the sale set aside, that the plaintiff not having offered to repay Rs. 1,700 and interest, his suit must be dismissed.

3 AK 220
153
6 must 17

THIS was a suit brought by Gopaul Sahoo for possession of an eight-anna share of Mauza Kawta, by setting aside a *kabala* executed by Sona Sahoo, the widow of one Gooroochurn Sahoo, deceased, in favor of the defendant, on the allegation that he was the heir of Gooroochurn, and that the widow had alienated the property without legal necessity; and that the widow being dead, he, as the heir of Gooroochurn, was entitled to possession.

The defendant set up (*inter alia*) in defence, that the property was sold by the widow of Gooroochurn to pay off the debts incurred by her husband, and to defray the expenses of a pilgrimage to Gya, and for performance of *sradh* and *kartik-udyapan*.

The Subordinate Judge found that there was no evidence to show the amount of the debt of Gooroochurn for the payment of which, it was alleged, the property had been sold; that the evidence of Davee, who was a nephew of Sona Sahoo, showed

*Special Appeal, No. 1115 of 1872, from a decree of the Judge of Bhagulpore, dated the 1st May 1872, affirming a decree of the Subordinate Judge of that district, dated the 13th May 1871.

(1) See *Mohomed Ushruf v. Brojessures Dossee*, ante, p. 118.

that she never went to Gya ; that the expenses incurred for the performance of *kartik-udyapan* could not be considered as having been incurred for a legal necessity, it being nowhere acknowledged to be of such superior efficacy as to legalize the sale of property by a Hindu widow for its performance ; and that the defendant having failed to prove any legal necessity for the sale, the plaintiff, as the next heir, was entitled to recover possession. He, accordingly, passed a decree in favor of the plaintiff.

On appeal the Judge found that the alleged payment of debts incurred by Gooroochurn was not proved ; that there was no evidence to show that there was any pressure on the estate for payment such as to justify the alienation ; that there was no necessity for a sale of the property to defray the expenses of the pilgrimage to Gya, as Sona Sahoo was well off, and could easily have defrayed the expenses without alienating the property ; and that the defendant had failed to make out a case of legal necessity to justify the alienation. He, accordingly, dismissed the appeal.

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The defendant appealed to the High Court.

Baboos *Romesh Chunder Mitter* and *Tarruck Nath Dutt* for the appellant.

Baboos *Kaliprosonno Dutt* and *Chunder Madhub Ghose* for the respondent.

Baboo *Tarruck Nath Dutt* contended that the widow was justified in making a pilgrimage to Gya, and that the sum spent on the occasion was a legitimate expense for the spiritual benefit of Gooroochurn Sahoo. The performance of *sradh* and *kartik-udyapan* were for the benefit of her husband's soul. The profits of the estate left by Gooroochurn were barely sufficient for the maintenance of the widow. The widow can alienate for the spiritual benefit of her husband—*Ramchunder Surma v. Gungagovind Bunhoojiah* (1) and *Chowdhry Junmejy Mullick v.*

(1) 4 *Scl. Rep.*, 147.

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Sreemutty Russomoyee Dossee (1). A Hindu widow is bound to pay the debts of her husband ; hence the alienation was justifiable.

(1) *Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

The 26th August 1868.

CHOWDREY JUNMEJOY MULLICK
(ONE OF THE DEFENDANTS) v. SRE-
MUTTY RUSSOMOYEE DOSSEE
(PLAINTIFF).*

*Hindu Law—Alienation—Sradh—
Limitation.*

Baboo Aushootosh Chatterjee for the appellant.

Baboo Kissen Sucka Mookerjee, Sreenath Doss, Kally Mohun Doss, and Doorga Mohun Doss for the respondents.

THE judgment of the Court was delivered by

MITTER, J.—This was a suit instituted by the plaintiff, now respondent before us, to recover possession of certain moveable and immoveable properties described in the plaint. The case set up by the plaintiff was that the properties sued for by her were held and owned by her father, the late Gudadhur Roy ; that, on the demise of her father without male issue, his whole estate, real and personal, devolved upon her mother Sreemutty Deyee as his next heir and successor ; that, on the death of her mother, which took place on the 19th Bhadra 1273 (16th September 1866) the plaintiff, as the only heir and representative of her father, wanted to take possession of the estate, but that she was opposed by the defendants in the cause under color of various titles alleged to have been created in their favor by the said

Sreemutty Deyee. The cause of action was stated to have arisen on the 14th May 1866, the date when their opposition was alleged to have been offered. The principal Sudder Ameen of Midnapore, Baboo Nobinkissen Palit, has given a decree to the plaintiff in respect of a portion of her claim, and the present appeal has been accordingly preferred to us by the defendant Chowdry Junmejoy Mullick.

The properties involved in this appeal may be conveniently arranged under the following heads :—

1st.—8 annas of Joonbuldia.

2nd.—1 anna 5 gundas of Mehal Chuck Shampallora.

3rd.—204 bigas of lakhiraj land referred to in paragraph 6 of the written statement filed by the appellant.

4th.—222 bigas of lakhiraj land referred to in the 7th paragraph of the written statement filed by the appellant.

With reference to the first item of property it is contended that the decision of the Principal Sudder Ameen is erroneous on the question of limitation as well as on that of title. We are of opinion that the contention is sound. The principal Sudder Ameen has overruled the plea of limitation on the ground that the action, has been brought within twelve years from the date of the death of the plaintiff's mother ; and on the question of title, he has held that the evidence produced by the plaintiff has satisfactorily shown that her father was in possession. It is contended that the appellant does not claim the property in question upon a title created in his favor by the mother of the plaintiff, and the plaintiff

* Regular Appeal, No. 323 of 1867, from a decree of the Principal Sudder Ameen of Midnapore, dated the 3rd August 1867.

For religious and charitable purposes, a Hindu widow can alienate—The *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1). The sale cannot, at any rate, be set aside without

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is therefore bound to prove either that her father or her mother, who represented his estate, was in possession at some time within twelve years prior to the institution of the suit. On turning to the evidence produced by her, we find that it is altogether insufficient to prove either title or possession. This evidence consists of the depositions of a few witnesses, and of nothing more. The evidence of these witnesses does not go one single step beyond a vague and general statement to the effect that the plaintiff's father was the owner of the property in question, and that he was in possession thereof. No information is given as to the nature of this ownership, nor as to the time when possession was held under it by the father of the plaintiff; and in the absence of such information, we can hardly deem ourselves justified in relying upon such evidence even if it were free from other imputations, which is by no means the case. It is perfectly true that the opinion of the Court examining the witnesses about the value of their testimony is, as a general rule, entitled to every consideration, but where that Court does not appear to have taken the slightest pains in dealing with the evidence, this rule can hardly be said to apply. It is much to be regretted that the lower Court has failed in this case to bestow the slightest care upon the examination of the witnesses produced by the parties, but we cannot upon that ground act upon evidence so vague and unsatisfactory as that which has been referred to above. At any rate it is clear that, even if we were to accept this evidence as it goes, there is nothing to show that the plaintiff's father, or

that her mother, was in possession of this property at any time within twelve years prior to the date of the suit. On the other hand, the appellant has satisfactorily shown that the disputed property has been held by him for a very long period of time as part and parcel of Mehal Kenky, which was purchased by him at a sale for arrears of revenue. We are therefore of opinion that this portion of the plaintiff's claim ought to be dismissed on the ground of limitation, as well as on that of her failure to prove her title.

With reference to the second item of property, it is to be observed that the appellant claims 1 anna out of the 1 anna 5 gundas comprised therein, under a conveyance executed in his favor by the mother of the plaintiff on the 12th Chaitra 1264 (26th March 1858); the remaining 5 gundas being claimed by him under another conveyance executed in his favor by some of the co-sharers of the plaintiff's father. The Principal Sudder Ameen has set aside the purchase made from the mother of the plaintiff, on the ground that the appellant has failed to establish any justification for the alienation, and the remaining 5 gundas share has been also taken away from him upon the ground that his vendors had no right to transfer it to him. With reference to the purchase made from the mother of the plaintiff, the appellant contends that she, the plaintiff was a consenting party to the alienation, and further that, independently of such consent, there was a valid necessity to support it. The Principal Sudder Ameen appears to have

(1) 8 Moore's I A., 500.

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payment of the amount which the widow was justified to raise—
Phoolchund Lall v. Rughoobuns Suhaye.

said nothing on the first point, and we are, therefore, obliged to decide it for the first time in appeal, although it was urged by the appellant from the very beginning. We think, however, that the appellant has disproved his own plea. It is true, indeed, that the evidence produced by the appellant goes to show that the plaintiff was a consenting party to the alienation she now complains of, but that very evidence, or at least the major part of it, conclusively shows that the plaintiff was minor at the time. We think, therefore, that this plea must be rejected. The second objection, however, is sound. The appellant has shown, by good and satisfactory evidence, that the plaintiff's mother had occasion to defray the expenses of the *sradh* of her husband's mother, and that it was for the purpose of raising funds on account thereof that the sale in question was made. Some of the co-sharers of the plaintiff's father, who are also members of the same family with him, have been examined to prove this fact, and we do not see the slightest reason for discrediting their testimony. The principal Sudder Ameen says that Shoonder Narain Roy, the eldest brother of the plaintiff's father, being then alive, the mother of the plaintiff had nothing to do with the *sradh*, but the Principal Sudder Ameen entirely forgets the position which a Hindu widow occupies with reference to the estate of her deceased husband. This position is clearly laid down in the *Dayabhaga*, p. 182. "For women, the heritage of their husbands is pronounced applicable to use. Let not women, on any account, make waste of their husband's

wealth." The word "waste" is expressly defined to mean "expenditure not useful to the owner of the property." It is clear, therefore, that the mother of the plaintiff had full right to alienate any portion of the estate in her possession, if the benefit of her husband's soul required such a sacrifice, even though the act by which that benefit was to be secured was to be actually performed by a male member of the family. It is a mistake to suppose that she holds the estate in trust for the benefit of the next heir of her husband, and such an heir has no right to contest the validity of an alienation that has been made for the spiritual welfare of the deceased owner himself. Now the performance of the *sradh* of his mother was a matter of the utmost importance to the *manes* of the plaintiff's father, and whoever might have performed it, the plaintiff's mother was fully justified in raising funds for such performance. It is a settled doctrine of the Hindu law that a deceased Hindu participates in the funeral cakes that are offered by any of his surviving relatives to a common ancestor to whom he himself was bound to offer them when living. If the plaintiff's father had been living, he would have been bound to perform the *sradh* of his mother, and he is, therefore, competent after his death, to share in the oblations offered to her by any of his male relatives. The mother of the plaintiff, therefore, was bound in duty to raise funds for the *sradh*, whoever might have performed it; and by raising funds for this purpose, she was using, and not wasting, the property within the meaning of the definition above pointed

(1) 9 W. R., 108.

Baboo *Kaliprosonno Dutt* for the respondent contended that, as both the lower Courts had found that there was no legal necessity, the plaintiff was entitled to have the sale set aside. There is no finding by the Judge that the widow ever went to Gya or incurred any expense for such pilgrimage. Besides, the lower Appellate Court has found as a fact that there was no necessity for contracting any debt for this purpose, as the estate in the hands of the widow was sufficient for such purposes. Upon the findings of the lower Court, the purchaser is not entitled to retain possession of the property.

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Baboo *Tarruck Nath Dutt* in reply.

The judgment of the Court was delivered by

PHEAR, J.—After giving consideration to this case, we are of opinion that the 900 rupees, the debt incurred for Gya pilgrimage, and the 800 rupees, the debt incurred for the *sradh*, by the widow, were expenses to liquidate which it was within the power of the widow to alienate her husband's property. They are of the nature of expenditure for the purpose of procuring spiritual benefit for the husband, and it has been laid down by the Privy Council, and the doctrine has been constantly followed by this Court, that the widow's power of alienation for spiritual purposes is larger than the power of alienation to which necessity gives rise. It has been long settled that she is not, in any proper sense, trustee for the heirs: she has the whole inheritance in her with a limited power of alienation—a power of alienation which can only be exercised, perhaps I may say, in two classes of contingencies,—one class comprising cases of necessity, and the other class, cases of raising money for spiritual purposes.

out. The Principal Sudder Ameen enquiries about the existence of the also says that the appellant has given alleged necessity, and that it was a no evidence to prove that the *sradh* necessity sanctioned by the Hindu was actually performed, but evidence law. The appellant has given ample on this point is altogether unnecessary. evidence to prove this part of his All that the appellant was bound to case, and there is literally no evidence show was that he had made reasonable produced by the plaintiff to rebut it.

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In this view it appears to us that the alienation was a good alienation, although it may be that the Rs. 1,700, which is the total of the two items to which I have referred, may have been an inadequate consideration for the sale: I suppose, indeed, we must take it to have been an inadequate consideration, because the actual purchase-money was Rs 4,000.

Under these circumstances the alienation is not void, but, as was expressed by the late Chief Justice, in the case of *Phoolchund Lall v. Rughooburn Suhaye* (1), is voidable by the heir upon his offering to pay the real consideration (in this case it would be Rs. 1,700), together with reasonable interest thereon, and upon the further condition, of course, that the defendant should account for the rents and profits during the interval over which he had been in possession, both the interest and the account of rents and profits to run from the date of the widow's death. We think, therefore, that the decrees of both Courts below, which have been passed in favor of the plaintiff without any qualification whatever, are wrong decrees, and must be reversed.

The plaintiff has not in this suit expressed his readiness to repay the defendant any portion of the purchase-money, but has sought to recover the property unconditionally.

Under the circumstances we think that the right order will be to dismiss the plaintiff's present suit, leaving him to any future remedy if he has any right to it.

The defendant, appellant, must have his costs in all the Courts.

Appeal allowed.

(1) 9 W. R., 108.

FULL BENCH RULING.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Jackson,
Mr. Justice Phear Mr. Justice Pontifex, and Mr. Justice Ainslie.*

1873
May 20.

BHYRUB CHUNDER SURMAH CHOWDHRY AND ANOTHER (PLAINT-
PIFS) v. MADHUBRAM SURMAH, *alias* MADHUB CHUNDER
SURMAH, AND OTHERS (DEFENDANTS).*

Review—Act VIII of 1859, ss. 376 to 378—Appeal—“Final.”

Where a Subordinate Judge, after deciding a regular appeal granted an application for review of judgment on the ground that new evidence had been discovered, but without any enquiry or proof that such evidence was not within the knowledge of the applicant, or could not be adduced by him at the time the decree was passed, *held* that this was an error or defect in the procedure or investigation of the case which affected the decision, and was a ground of appeal when the decision upon review was brought before the High Court on special appeal.

The word “final” in s. 378 of Act VIII 1859 means that the order rejecting the application or granting the review shall not by itself be open to appeal.

In this suit, which was brought to recover certain plots of land, the Subordinate Judge of Sylhet, on the 8th of January 1862, on appeal, gave a decision in favor of the plaintiffs. The defendants, Madhub Chunder Surmah and Bhyrub Chunder Surmah, filed a petition for a review of the judgment with respect to plots Nos. 3 and 4 of the lands in suit, and an application for review of the judgment as to plot No. 4 was granted on the ground that new evidence had been discovered. The suit was then retried as to plot No. 4, and the result was that the suit was dismissed as to that plot with costs.

The plaintiffs then preferred this special appeal, which was heard before Couch, C.J., and Glover, J. It was objected that the lower Appellate Court was wrong in allowing a review without

* Special Appeal, No. 957 of 1872, from a decree of the Subordinate Judge of Sylhet, affirming a decree of the Munsif of Russoolgunge, dated the 23rd of January 1871.

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enquiry or proof that the new evidence was not within the knowledge of the applicant for review at the hearing of the case, or could not be adduced by him when the decree was passed. It was admitted that no evidence of the statement in the petition for review was taken.

The question, therefore, arose whether the order of the Subordinate Judge granting the review was not final, and could not be questioned in this special appeal.

The decisions in the High Court were conflicting. On one side were *Naffar Chand Pal Chowdhry v. Sandes* (1) *Umrao Thakur v. Gakul Mandal* (2) and *Nudarchund Bhooya v. Reedoy Mundul* (3); and on the other, *Shaikh Gholam Hossein v. Okhoy Coomar Ghose* (4) and *Cochrane v. Heralal Seal* (5).

(1) 8 B. L. R., App., 35, note.

(2) *Id.*, 34.

(3) *Before Mr. Justice Kemp and Mr. Justice Glover.*

The 14th March 1872.

NUDARCHUND BHOoya (ONE OF THE DEFENDANTS) v. REEDOY MUNDUL (PLAINTIFF).*

Review—New Evidence.

Baboo Grish Chunder Ghose for the appellant.

Baboo Mohendro Loll Mitter for the respondent.

THE judgment of the Court was delivered by

GLOVER, J.—The substantial question for decision in this special appeal is whether the Deputy Commissioner has acted according to law in admitting a review of judgment.

The circumstances are as follows:—
The plaintiff sued for possession of

land leased to him by Haradhone Dass in the year 1276 B.S. (1869), and of which the defendants Sooroof Bhooya and others kept him out of possession. These defendants claimed to hold of the same Haradhone Dass on a lease granted in 1261 B.S. (1854), and denied the power of the zemindar to oust them, they having, by a tenancy of more than twelve years, obtained a right of occupancy.

The zemindar, who was made what is called a *pro forma* defendant, supported the plaintiff's case. The lease to the defendant was for four years only, on the expiry of which the land was given to the plaintiff. The Munsif decreed the suit in favor of the plaintiff. But the Deputy Commissioner on appeal reversed that decision, holding that the potts of the defendants was genuine, and that their possession for more than twelve years was clearly proved.

(4) 3 W. R., Act X Rul., 169.

(5) 7 W. R., 79.

* Special Appeal No. 920 of 1871, from a decree of the Deputy Commissioner of Maunbhoom, dated the 9th May 1871, affirming a decree of the Munsif of that district, dated the 25th November 1869.

The following cases were referred to as bearing on the point:—
Gunganarain Roy v. Gonoomonee (1) and *Shamachurn Chucker-*
butty v. Bindabun Chunder Roy (2)

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An application was made for a review of this judgment, and the Deputy Commissioner (not the officer who had passed the decision on appeal) admitted it on the ground that the new evidence filed by the plaintiff proved that the defendants could not have been, as they alleged, in possession of the land in 1260—62 (1853—55), and that their story of long uninterrupted possession from the year 1261 (1854) was false. The Deputy Commissioner therefore reversed the order of his predecessor, and confirmed the original decision of the Munsif.

Now, if the Deputy Commissioner admitted the review on grounds that are good in law, this Court would have no jurisdiction to interfere, or to say that the review ought not to have been granted.

The petitioner for review, Reedy Mundul, based his application on the discovery of new evidence, which he said was on the record of an Act IV of 1840 case, and he produced an authenticated list of the documents then filed, to prove that these documents were on the Act IV record. These documents were produced at the hearing, and, as before mentioned, decided the case in favor of the applicant for review.

The rule of law we take to be that a Judge ought not to admit a review for the purpose of receiving fresh evidence in a suit until he is satisfied by legal evidence that the new matter was not known to the applicant, or could not be adduced by him,

when the decree was passed. The point has been ruled in this sense in *Dwarka Nath Chowdhry v. Kishen Lall Chowdhry* (a), *Shumsheir Ali Khan v. Ramchunder Goopto* (b), *Naffar Chand Pal Chowdhry v. A. D. Sandes* (c), *Khelut Chunder Ghose v. Frankristo Day* (d)—which expressly followed the former ruling—and *Umrao Thakur v. Gakul Mandal* (e). We may therefore lay it down as settled law that a judge admitting a review on the ground of the discovery of new evidence, must first satisfy himself on legal evidence that the applicant has brought himself within the section, in other words must insist on the fact of the applicant's ignorance or inability being strictly proved.

Now in this case this proof is altogether wanting; indeed, the Deputy Commissioner does not seem to have asked for it. The plaintiff filed a simple unverified petition, and on it the Judge acted. No attempt was made to prove that the plaintiff was previously unaware of the existence of certain documents on the record of the Act IV suit, or that being aware he was unable to procure them. He did not even give the pledge of his own deposition. It may be doubted indeed whether a simple affidavit would have been sufficient; but the plaintiff gave no evidence at all on the points

(1) 8 W. R., 184.

(2) Case No. 1395 of 1866; 30th January 1868.

(d) *Post*, p., 428.

(e) 8 B. L. R., App., 34.

(a) *Marsh*, 553.

(b) 2 W. R., 174.

(c) 8 B. L. R., App., 35, note.

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The cases in other Courts—*Gurumartti Nayudu v. Pappa Nayudu* (1), *Subbramhniya Pillay v. M. Perumal Chetty* (2), and *Dhunika Devla v. Hira Ramla* (3).

In consequence of this conflict of decisions the question was referred to a Full Bench: "Whether the order granting the review is final and cannot be questioned in this appeal, on the ground that there was no enquiry or proof that the new evidence

required, and that being so we think that no application on his part for a review of judgment could have been legally obtained.

It is not necessary for us to comment on the facts of the petitioner's application, but it is open to the remark that, if the plaintiff knew of the Act IV proceeding at all, there was no apparent reason why he should have been ignorant of these particular documents, and also (a point which seems to have escaped the Deputy Commissioner) that Reedy Mundul was himself a defendant in the Act IV suit, and being in that position would have found it hard to explain his ignorance of the new matter which he wished to bring forward, or his inability to adduce it when the suit was originally tried.

The pleader for the special respondent endeavored to show that the review was not admitted by the Deputy Commissioner on the ground of new evidence alone, but on other grounds also which would bring it within the meaning of the words "good and sufficient reason" of s. 376, Code of Civil Procedure, in which case there would be no appeal against the order admitting the review. It seems clear to us, however, that the Deputy Commissioner had no other reason for admitting the application than this so-called new evidence. He says:—"Plaintiff has applied for a review of judgment,

urging that he had procured fresh documents that bore on the case, and that these would prove that the potta filed by the defendant was a forgery, and that the kabuliat given by him to the *pro forma* defendant in 1271 (1864) for four years was a true document." In other words, that the potta and kabuliat in question, on which the original judgment was in great part based, would be shown by the new evidence to be then filed to support the plaintiff's case instead of damaging it. It is not contended that the Deputy Commissioner had begun to take a different view of the importance of this potta and kabuliat, irrespective of the new evidence sought to be filed, or that he had the least intention of reviewing the judgment of his predecessor on any other ground than that of new evidence.

We are therefore of opinion that this appeal should be allowed, and that the judgment of the Deputy Commissioner passed after the admission of the review should be set aside. As we take this view of the case, there is no necessity for our going into the question as to how far the new evidence was binding on the defendants. The special respondent will pay all the costs.

(1) 1 Mad. H. C. Rep., 164.

(2) 4 Mad. H. C. Rep., 251.

(3) 4 Bom. H. C. Rep., A. C., 57.

was not within the knowledge of the applicant at the hearing, or could not be adduced by him before the decree was passed."

Baboo *Mohinimohun Roy* and *Greeshchunder Ghose* for the appellants.

Baboo *Chunder Madhub Ghose* and *Rajender Bose* for the respondents.

Baboo Mohinimohun Roy.—When the ground on which a review is sought is the discovery of new evidence, it is a condition precedent that the matter is new, and was not within the knowledge of the applicant, or could not be adduced by him at the original trial. S. 372 of Act VIII of 1859 gives an appeal from the last judgment for any error in law. There are authorities that the order admitting a review can be questioned when the whole case comes up on appeal after judgment—*Shumshair Ali Khan v. Ram Chunder Goopto* (1), *Nolita Mohon Roy Chowdhry v. Denonath Mookerjee* (2), *Naffar Chand Pal Chow-*

(1) 2 W. R., 174.

(2) *Before Mr. Justice Phear and Justice Sir C. P. Hobhouse, Bart.*

The 10th June 1863.

NOLITA MOHON ROY CHOWDHRY (ONE OF THE DEFENDANTS) v. DENONATH MOOKERJEE (PLAINTIFF).*

Review—New Evidence—Act VIII of 1859, s. 377.

Baboo *Hem Chunder Bannerjee* for the appellant.

Baboo *Chunder Madhab Ghose* and *Greenath Bannerjee* for the respondent.

The judgment of the Court was delivered by

PEAR, J.—I think that this appeal

is conclusively governed by a series of decisions of this Court, and particularly by those in the cases of *Gunganarain Roy v. Gonoomonee* (a) and *Shamachurn Chuckerbutty v. Bindabun Chunder Roy* (b). Indeed, it is only necessary for me to quote a passage from the judgment of the Chief Justice as given in the case of *Gunganarain Roy v. Gonoomonee* (a) to adopt it as expressive of the opinion of this Bench, in order to completely decide, in favor of the special appellant, the question which is raised by his first ground of appeal. The Chief Justice says:—"It appears to me that upon the principle of that case (c),"

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* Special Appeal, No. 2732 of 1867, against the decree of the Second Principal Sudder Ameen of Zilla 24-Pergunnas, dated the 27th June 1867, modifying a decree of the Sudder Ameen of that district, dated the 14th October 1866.

(a) 3 W. R., 184.

(b) Case No. 1385 of 1866; 30th January, 1868.

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dhry v. A. D. Sandes (1), Khelut Chunder Ghose v. Prankisto Day (2), Umrao Thakur v. Cakul Mandal (3), and Nudarchund

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the decision of the Privy Council), the order of the Principal Sudder Ameen admitting the review, without stating that he was satisfied that there was good reason for the delay in presenting the petition of review, cannot stand." These words are so opposite to the present case that one might suppose that they were pronounced in direct reference to the facts before us.

The Principal Sudder Ameen has here admitted the review after the expiration of ninety days prescribed by s. 377 of Act VIII of 1859, and he has not shown or stated that he was satisfied there were good reasons for the delay. It follows, therefore, on the authority of the above case alone, that the judgment of the Principal Sudder Ameen on review cannot be upheld, and must be reversed.

It is not necessary that I should go further into the matter of the special appellant's objections, but I think it right to say that if, as appears to have been the case, there was no new matter brought before the Principal Sudder Ameen at the hearing of the review, which the petitioner in review could not with reasonable diligence have obtained, brought forward, or urged, at the time of the original hearing, or some other like cause affecting the administration of substantial justice between the parties, the review ought not to have been entertained, even had the application for review been preferred within the limited time of ninety days. When one Civil Court has passed a final decision between the parties, it loses

jurisdiction over the suit except for the purposes of executing the decree, and it cannot hold a new trial of the same unless, for some reason within the Procedure Act, the first trial appears to have been unfair between the parties. We reverse the decision of the Principal Sudder Ameen made on review, and confirm the decree which he made on the original hearing on appeal on the 20th of April 1864. The special appellant must have his costs in this Court, and also his costs in the lower Court on review.

- (1) 8 B. L. R., App., 35, note,
(2) *Before Mr. Justice L. S. Jackson and Mr. Justice Glover.*

The 1st December 1869.

KHELUT CHUNDER GHOSE
(PLAINTIFF) *v.* **PRANKISTO DAY**
AND OTHERS (DEFENDANTS).*

Review—New Evidence.

Baboo Motilall Mookerjee for the appellant.

Mr. H. E. Mendies and **Baboo Prosonno Coommar Roy** for the respondents.

The judgment of the Court was delivered by

L. S. JACKSON, J.—The Subordinate Judge, in this case, first dismissed the suit of the plaintiff on the ground that the plaintiff had not substantiated his right to maintain the suit, as the purchaser of the rights of the parties entitled to wasilat. Thereupon the

- (3) 8 B. L. R., App., 34.

* Special Appeal, No. 1934 of 1869, against the decree of the Judge of Zilla Beerbhoom, dated the 10th May 1869, reversing the decree of the Subordinate Judge of that district, dated the 25th January 1869.

Bhooya v. Reedoy Mundul (1): These cases show what the word "final" in s. 378 means. In construing an Act it is necessary to look to the consequences that would follow any particular

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plaintiff applied to that Court for a review of judgment on four grounds:

"1st,—that the plaintiff could not file his deed of purchase as it had been filed in a summary case, No. 41 of 1868, which was still pending; 2nd,—that case, No. 41, is a case for meane profits of the same property, but only for an antecedent period, hence he was obliged to file the deed of purchase in that case; 3rd,—that his vendors had admitted the purchase by him in the name of Rohinee Nundun Mitter, in case No. 41, and Rohinee Nundun in the same case admitted his purchase, and that he has brought no objection in this case, and is willing to put in a petition of consent; 4th,—that the applicant is willing to prove his purchase." "With this petition," the Judge observes, "the applicant filed copies of the deed of sale and of the admissions." On this the Subordinate Judge admitted the review making his order in these words:—"Whereas the grounds urged in the petition for review by the applicant are sufficient, and the vendors also have admitted the sale by petition, it is ordered that the application be granted, and the case be restored." Thereupon the Subordinate Judge heard the case *de novo*, and gave judgment for the plaintiff.

Against the judgment so obtained, the defendant appealed to the Zilla Court. The Judge, on hearing the appeal, considered that the Subordinate Judge, had irregularly admitted the application for review, and thereupon set aside the whole of the proceedings

founded upon that irregular admission of the review, and decreed the appeal, thereby dismissing the plaintiff's suit. The Judge supports his decision by reference to the case of *Naffar Chand Pal Chowdhry v. A. D. Sandes* (a).

It is urged before us in special appeal that we ought to assume that the Subordinate Judge, in admitting the review, had good and sufficient reasons for so doing, and that, upon that assumption, the admission of the documents tendered by the plaintiff would be justified, and reference is made on this argument to the case of *Behari Lal Nandi v. Srimati Trailakhomayi Barmani* (b).

It seems to me perfectly clear that the Subordinate Judge admitted this review upon the grounds stated in the petition for review, and upon no others, and it seems perfectly clear that those grounds related exclusively to the fresh matter tendered as evidence by the plaintiff, and that the object of that application was to get in that fresh matter, and nothing else. It is not denied that the petition so presented was unverified and supported by no proof of the kind referred to in the case cited—*Naffa Chand Pal Chowdhry v. A. D. Sandes* (a). That being so, it seems to me that we ought to follow the ruling laid down in that case, and that the Judge's decision was therefore right, and that this special appeal ought to be dismissed with costs.

(1) *Ante*, p. 424.

(a) 8 B. L. R., App., 35, note.

(b) 3 B. L. R., 246.

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construction with reference to the intention of the Legislature. Now, in *Nasiruddin Khan v. Indronarayan Chowdhry* (1), a second review was allowed, although the order is said to be final. the same view was taken in *Shamachurn Chuckerbutty v. Bindabun Chunder Roy* (2), in which a review was admitted after the lapse of ninety days; but it was set aside, showing that the word "final" does not mean that the Court cannot question the order admitting a review.

Baboo Rajender Bose.—S. 376 no doubt has the restricting words "from the discovery of new matter or evidence which was not within his knowledge, or could not be aduced by him at the time when such decree was passed;" but s. 373 makes the order final. The only case in which the order is not final is where no notice is given. Ss. 376 to 378 follow s. 372, by which appeals are allowed. These sections, therefore, are exceptions to the law laid down in s. 372. An order, therefore, admitting the review is final, and cannot be questioned—*Shaik Gholam Hossein v. Ohoy Oommar Ghose* (3) and *Cochrane v. Heralal Seal* (4). The following cases were also relied on : *Gurumurti Nayudu v. Pappa Nayudu* (5), *Subbramaniya Pillay v. M. Perumal Chetty* (6), *Dunka Devla v. Hira Ramla* (7), and *Apcar v. Howah Bye* (8).

The following Judgments were delivered:—

COUCH, C. J. (PONTIFEX and AINSLIE, JJ., concurring) (after reading the question referred, continued).—Now, in a special appeal, a decision passed in regular appeal may be questioned on the ground that there has been a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits. In this case the Judge of the lower Court allowed a review of a decision passed in regular appeal without any

(1) B. L. R., Sup. Vol., 367.

(2) Case No. 1335 of 1866; 30th
January 1868.

(3) 3 W. R., Act X Bul., 169.

(4) 7 W. R.; 79

(5) 1 Mad. H. C. Rep., 164.

(6) 4 Mad. H. C. Rep., 251.

(7) 4 Bom. H. C. Rep., A. C., 57

(8) 1 I. J., N.S., 237.

enquiry or proof that the new evidence was not within the knowledge of the applicant for the review at the hearing of the case, or could not be adduced by him when the decree was passed.

It was admitted that this was so. S. 376. Act VIII of 1859, allows an application to be made for a review by any person who, from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when the decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him. In order that the Court may grant a review on the ground of the discovery of new matter or evidence, it must be such a case as is here described; and if a Court grants a review without its being shown that the evidence was not within the knowledge of the applicant, or could not be adduced by him when the decree was passed, it is an error in the procedure—it is granting a review when the law does not allow one to be granted,—granting it in a case which does not come within those specified in the section which allows an application to be made for a review.

It is true that in s. 378 the words of s. 376 are not repeated. It is said generally:—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application;" and if the applicant does not show any such grounds as are described in s. 376, that is to say, if the application is not supported by proof that there are such grounds, it ought to be rejected. It would not be proper for the Court to receive an application on account of the discovery of new evidence without having some proof of the truth of the allegation. In another part of s. 378 it is said that, "if it (the Court) shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review." But I do not think that this part of the section is applicable to the present case, because the application for a review was upon the specific ground of discovery of new evidence. It appears to me that the act of the lower Court in granting the review, as it did, without any evidence of the fact which was necessary to make the granting it allowable, was an error of law in the procedure

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which is a ground of appeal when the decision upon the review is brought before this Court in special appeal.

Then what is the effect of s. 378? It says that the order of the Court granting the review or rejecting the application shall be final. Is that to be read as controlling the right of special appeal to the extent that, when the decision upon the review is brought before the Court, it is not to take notice of the error in law in the procedure by granting the review and rehearing the case? It appears to me that, taking the sections together, we ought not to give such an effect as that to the word "final."

It means there, as it does in some other parts of Act VIII, for instance in s. 257, that the order rejecting the application or granting the review shall not by itself be open to appeal. A person shall not be at liberty to go to the Appellate Court and contend that the Court which has refused or has granted a review ought not to have done so. But the word is not to be so construed that, when the decree in the suit has been made, the legality of the order granting the review shall not be in any way questioned; that, although the review may have been illegally granted, no question about it shall be allowed to be raised, and a person who had a decree in his favor shall not be at liberty to show that he was illegally deprived of the benefit of it by the Court granting a review, where the law has not said that a review may be granted to a person who merely said that he had discovered fresh evidence, but did not bring himself within the provisions of the law which says that the discovery shall be of evidence "which was not within his knowledge, or could not be adduced by him at the time when the decree was passed."

I think that is the construction which we ought to put upon these words in s. 378, and that it is proper that the parties in a special appeal shall be at liberty to show that there has been an error or defect in the procedure by the granting of the review which has affected the decision of the case upon its merits, by producing a different decision from what had been before come to.

JACKSON, J.—I am of the same opinion. In the state of

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the law before the Civil Procedure Code was enacted, it was not competent to the inferior Courts in Bengal to review their own judgments without the sanction of the superior Courts. By s. 376 (Civil Procedure Code), all Civil Courts were empowered to review their judgments for any of the causes set forth in that section, one of them being "the discovery of new matter or evidence which was not within his (the applicant's) knowledge, or could not be adduced by him at the time when the decree was passed against him." This seems to be a specific cause on which a party aggrieved by a decree is entitled to apply for a review of such decree. I think that, in respect of that cause, the power of the Court to grant a review is specially limited by the words of that section. Then s. 378 declares that the order of the Court whether granting or rejecting the review "shall be final." That seems to me to bring the order into the position of an interlocutory order within the meaning of s. 363, that is to say, that it is an order not of itself appealable, but which "may be set forth as a ground of objection in the memorandum of appeal," if, in pursuance of the admission of a review of judgment, a decree be passed against the party against whom the review is granted.

I quite concur, therefore, in thinking that, although an order granting a review cannot be made the subject of appeal standing alone, yet the appellate Court can take notice of it in special appeal, and if the review was improperly granted, can set aside the judgment passed in furtherance of such review.

PHEAR, J.—I concur generally in what has been said by the Chief Justice. It has, on several former occasions, fallen to me to express my views on this matter of review under the Civil Procedure Code of this country, and those views are reported in more than one of the cases which have been referred to. I do not, therefore, think it necessary to add anything to what has already been stated very fully by the Chief Justice.

It seems to me that we ought to answer the question which has been referred to us in these words:—The orders of the Subordinate Judge granting a review can be questioned in special appeal.

Before Sir Richard Croom, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Phear, Mr. Justice Markby, and Mr. Justice Ainslie.

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April 1.

CHUNDER COOMAR MUNDUL AND ANOTHER (PLAINTIFFS) v.
NUNNEE KHANUM AND OTHERS (DEFENDANTS).*

Res Judicata—Decision by Deputy Collector—Evidence of Title—Act X of 1859, s. 23, cl. 6—Jurisdiction of the Revenue Courts—Act VIII of 1859, s. 2.

See also 15 B L R 241
15 B L R 247 *A*, a ryot, brought a suit in the Court of the Deputy Collector against *B*, his zemindar, for recovery of possession of a piece of land, on the ground that he was the holder of a *maurasi* potta, and that he had been illegally ejected by *B*. The Deputy Collector held that the *maurasi* potta was genuine, and that *B* had illegally ejected *A*. He passed a decree in favor of *A*, in execution of which *A* obtained possession of the land in dispute. In a suit brought by *B*, against the heirs of *A*, in the Civil Court, for recovery of possession of the said piece of land, on the ground that the *maurasi* potta was a spurious document, and that no *maurasi* potta had been granted to *A*, *Held* (JACKSON, J., doubting) that the decision of the Deputy Collector was not conclusive between the parties.

In 1866, one Backer Ali brought a suit in the Court of the Deputy Collector of the 24-Pergunnas, against the present appellants, Chunder Coomar Mundul and Jodoenath Mundul, under the provisions of cl. 6, s. 23, Act X of 1859, to recover possession of a certain piece of land, on the ground [that he had been in possession thereof under a *maurasi* potta, and that he had been ejected therefrom by the then defendants under color of a decree to which he was no party. The defence set up was that there was no relation of landlord and tenant between Backer Ali and the then defendants, and that the *maurasi* potta set up by Backer Ali was a spurious document. The Deputy Collector held that the potta was genuine, and that Backer Ali had been illegally ejected. He, accordingly, passed a decree

* Special Appeals, Nos. 1035 and 1036 of 1870, from the decrees of the Judge of the 24-Pergunnas, dated the 19th March 1870, reversing the decrees of the Additional Munsif of that district, dated the 30th April 1869.

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infavor of Backer Ali. This decree was confirmed by the Judge in appeal. A special appeal was preferred to the High Court, but it was rejected by a Division Bench.

The present suit was brought by Chunder Coomar Mundul and Jodoonath Mundul in the Court of the Additional Munsif of the 24-Pergunnas, against Nunnee Khanum and others, the heirs of Backer Ali, for the recovery of possession of the piece of land for which Backer Ali had obtained a decree from the Court of the Deputy Collector, on the ground that the *maurasi* potta set up by Backer Ali was spurious; that no *maurasi* potta had been granted by the plaintiffs; and that whatever right Backer Ali might have had in his lifetime to hold possession of the land in dispute, his heirs had no right to hold it after his death. The plaint stated that the cause of action arose when the special appeal in the former suit had been rejected by the High Court. The defendants set up (*inter alia*) in their written statement that the suit was barred by s. 2, Act VIII of 1859, as the *maurasi* potta had been found by the Deputy Collector to be a genuine document; and that the potta was genuine.

The Subordinate Judge citing *Gooroodoss Roy v. Ramnarain Mitter* (1), held that the suit was not barred by s. 2, Act VIII of 1859, but that the plaintiffs were not entitled to recover possession, as the *maurasi* potta was a genuine document. He, accordingly, dismissed the plaintiffs' suit.

On appeal, the Judge held that the suit was barred by s. 2, Act VIII of 1859; that *Gooroodoss Roy v. Ramnarain Mitter* (1) was not applicable to the present suit; that, as the *maurasi* potta had been held to be genuine by a Court of competent jurisdiction, the plaintiffs were barred from instituting a civil suit to contest its genuineness, that the decision of the Deputy Collector was final and conclusive between the parties, and as the tenure was *maurasi* and hereditary, the plaintiffs had no right to eject the defendants. He, accordingly, dismissed the appeal.

The plaintiffs appealed to the High Court.

The appeal came on for hearing before a Division Bench

(1) B. L. R., Sup. Vol., 628.

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(Jackson and Mitter, JJ.), who, in consequence of a conflict of decisions and a difference of opinion between their Lordships, referred the following question for the opinion of a Full Bench, viz :—"Whether the previous decision as to the potta is or is not conclusive between the parties?"

In referring the question the following judgments were delivered :—

JACKSON, J.—The question raised in this special appeal is certainly not free from doubt. It is one on which the two Judges constituting the present Bench are not entirely agreed ; and, under any circumstances, I should think it more advisable to abstain from pronouncing judgment in a case where that is so.

But in the present case, the state of the authorities is one which entitles us to abstain from coming to a final decision, and to refer the question for the decision of a Full Bench.

In a case decided by a Division Bench of this Court, in which my learned colleague was one of the Judges, *Aradhun Dey v. Golam Hossein* (1), it has been determined, without much argument so far as we can discover from the judgment, that the "judgment of the Collector in the matter of the genuineness of the potta is the judgment of a Court competent to determine that question in order to the determination of the further question of rent or of ejectment ; but as it is not the judgment of a Court of concurrent jurisdiction with the Civil Courts, it cannot be pleaded as an estoppel in the Civil Court in an action for the ejectment of the defendant as a trespasser."

That ruling has been relied on as an authority for contending in the present case, that the plaintiffs, whose suit was to eject the defendant, one Backer Ali, claiming to hold as hereditary *mokurraridars*, are not precluded by a previous decision of the Collector's Court in favor of the same Backer Ali in a suit brought by him against the zemindars (who are identical in title with the present plaintiffs) under cl. 6, s. 23 of Act X of 1859.

In pronouncing the judgment which I have just cited, Loch, J., refers, in support of the view taken, to a then recent judgment in the case of *Mussamut Edun v. Mussamut Bechun* (2), in

(1) 8 W. R., 487.

(2) 8 W. R., 175.

which difference of opinion having occurred between the two Judges of a Division Bench (Campbell and Phear, J.J.), the matter was re-argued before the learned Chief Justice, and Sir Barnes Peacock, concurring with Phear, J., held that the Collector's Court and Judge's Court were not Courts of concurrent jurisdiction, and, therefore, that the decision of the Collector is not conclusive except on the question of rent.

The matter which was under consideration in that case was very different from the matter in the present case. The question there was, whether, in a suit for rent, the defendant having set up a *zer-i-peshgi* ticca bond, and the Collector's Court having decided in favor of the validity of that bond, such decision was afterwards conclusive and binding in a suit on that bond in a Civil Court.

It is somewhat remarkable that, in a case occurring some time afterwards before a Division Bench of this Court, in which Loch, J., was the senior Judge,—namely, in the case of *Huro Lall Saha v. Sree Tirthanund Thakoor* (1)—that learned

(1) *Before Mr. Justice Loch and
Justice Sir C. P. Hobhouse, Bart.*

The 2nd May 1870.

**HURO LALL SAHA (PLAINTIFF) v.
SREE TIRTHANUND THAKOOR
AND OTHERS (DEFENDANTS).***

*Res judicata—Jurisdiction of Revenue
Courts.*

Baboo Khetter Mohun Mookerjee for the appellant.

Baboo Tarruck Nath Sen for the respondents.

THE COURT delivered the following judgments:

LOCH, J.—The plaintiff in this case is the proprietor of a resumed *malik* which he purchased from the former owners in 1274 (1867) by a private sale. He

took possession and ejected the defendants, who brought a suit under the provisions of s. 23, Act X of 1859 to recover possession, on the ground that they held the land under a potta from the plaintiff's vendors, and that the period of that potta had not expired. The Collector found that they held the land under a potta as alleged by them, and directed that they should be restored to possession.

The plaintiff brings the present suit to recover possession of the land, and to set aside the potta propounded by the defendants. The first Court gave him a decree. But the lower Appellate Court held that the question between the parties could not be disposed of by the Civil Court, that it had already been disposed of by the Revenue Court, and that the Civil Court could not interfere.

* Special Appeal, No. 2840 of 1869, from a decree of the Subordinate Judge of Purneah, dated the 23rd September 1869, affirming a decree of the Munsif of that district, dated the 29th May 1869.

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Judge and Hobhouse, J. delivering separate judgments in a case which appears to me extremely similar to the present

The plaintiff comes up in special appeal, and in support of his application quotes a judgment of the Full Bench in the case of *Gooroodoss Roy v. Ramnarain Mitter* (a); but we think that that judgment is not applicable to the present case. In that case there had been no trial in the Collector's Court, and what appears to have been decided then was that, if a tenant, on the plea of having been illegally ousted, did come under the provisions of s. 23 to recover possession, such an action would be looked upon as a possessory action; but where he came in upon his title and sought to recover on proof of his title, he might bring such an action in the Civil Court. Another case decided by the Full Bench, *Jonardun 'Acharjee v. Haradhan Acharjee* (b), has been shown us by the respondent, and that appears to meet this case. There it was ruled that, if a tenant came into the Collector's Court, under s. 23, seeking to be restored to possession on the plea of illegal ejectment, then the question as to the determination of his tenancy would have to be enquired into, and if it had terminated, he would not be entitled to recover possession. Now that was the question in the present case, which was decided in the Collector's Court: the defendants asked in that case to be restored to possession, because their lease had not expired, and it was necessary to try the point whether their lease had or had not expired before they would be entitled to recover. The Collector tried that point, found that their lease had not expired, and that it was a valid lease, and, therefore, put them back into

possession. The question which the plaintiff now asks us to try is the very same question as was tried by the Collector. There is no denial as to plaintiff's proprietary right on the part of the defendants, and the only obstacle to plaintiff's obtaining khas possession of the land in dispute is the lease which the defendants have propounded, and which has been already found by the Collector to be a valid lease, the period of which has not expired.

The question having already been determined by the Collector who had jurisdiction to try it, and whose Court was a Court of concurrent jurisdiction, I think that it is not now again open for trial in the Civil Court; and therefore the judgment of the lower Appellate Court must be upheld, and the special appeal dismissed with costs.

HOBHOUSE, J.—I am of the same opinion. I have no sort of doubt but that the question before us is in reality *res judicata*. The cause of action was *mutatis mutandis* the same; the parties were the same; the subject-matter was the same; and in my judgment the Revenue Court which passed the decision of the 2nd September 1868 was a competent Court to pass the decision upon the said subject-matter. The cause of action was, as it is now, so far as the plaintiff was concerned that the defendant set up a potta said to have been given to him by the former proprietors of the estate, the term of which had not expired, and which, if it was a true potta, admittedly barred the plaintiff from obtaining

(a) B. L. R., Sup. Vol., 628.

(b) Case No. 689 of 1867; 29th April 1868

case, held: Loch, J., as follows:—"This question having already been determined by the Collector, who had jurisdiction to try it, and whose Court was a Court of concurrent jurisdiction, I think that it is not now again open for trial in the Civil Court, and therefore the judgment of the lower Appellate Court must be upheld, and the special appeal dismissed with costs." Hobhouse, J., used words somewhat to the same effect; his words are these:—"The Collector could not determine that the ejectment in the former suit was illegal until he had determined that the potta which the present plaintiff now denies, was a true potta. He had, therefore, obviously jurisdiction to determine whether that potta was a true potta or not. Having jurisdiction, he did determine that the potta was a good one, and determined it as between the parties now before us. This being so, the Collector did, I think, determine in the suit of 1868, and had jurisdiction to determine,

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khas possession of the land. The parties were admittedly the same. The subject-matter was, upon the decision of the Collector which has been read out to us, exactly the same, the plaintiff in that suit, who is the defendant in this suit, set up an illegal ejectment on this ground,—he said that the ejectment was illegal, because he was entitled to hold over until the expiry of the potta given by the former *maliks*. The defendant, who is now the plaintiff in this case, denied then, as he denies now, that the potta was a true potta, and admitted then, as he admits now, that, if it was a true potta, the present defendants were entitled to regain possession, because the term of it had not expired. The point before the Collector was, under the Full Bench Ruling in the case of *Jonardun Acharjee v. Haradhun Acharjee* (a) which Loch, J., has quoted, the point of illegal ejectment, and in order to determine that point the Collector was obliged to determine, in fact, he had nothing else to determine except the fact as to whether or not the then plaintiffs, who are now the defendants, had received from the former *malik* the potta then as now in question. The Collector could not determine that the ejectment in the former suit was illegal, until he had determined that the potta which the present plaintiff now denies, was a true potta. He had, therefore, obviously jurisdiction to determine whether that potta was a true potta or not. Having jurisdiction, he did determine that the potta was a good one, and determined it as between the parties now before us. This being so, the Collector did I think, determine in the suit of 1868, and had jurisdiction to determine, the very point now in question before us and so the matter is *res judicata*.

(a) Case No 689 of 1867; 29th April 1868.

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the very point now in question before us, and so the matter is *res judicata*."

In delivering judgment in that case, Loch, J., referred to the judgment of the Full Bench in the case of *Gooroodoss Roy v. Ramnarain Mitter* (1), but does not refer to the case which he himself had previously decided, of *Aradhun Dey v. Golam Hossein* (2).

The mode in which the decision of the Full Bench (in the case of *Gooroodoss Roy v. Ramnarain Mitter* (1)), is made to bear on the present case is this, that in that case the Full Bench expressed the opinion that "the words 'suits to recover the occupancy or possession of any land,' &c., in cl. 6, s. 23 of Act X of 1859, refer only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title and seeks to have his right declared, and possession given to him in pursuance of that title."

It seems very probable that the words in cl. 6, s. 23. had express reference to the two provisoes in ss. 21 and 22 of the same Act. But I confess that, as at present advised, I do not find anything in the terms of cl. 6 s. 23, which make suits brought under that clause mere possessory suits,—that is to say, I do not see anything which should debar the Collector's Court under Act X from enquiring into any plea which may be set up by the defendant in answer to the plaintiff's suit,—that is, that if are meant by possessory suits such suits as are analogous to suits under s. 15 of the Limitation Act of 1859, I do not find anything in the words of the Legislature to bear out that opinion, and, therefore, I think the Court is not authorized in limiting the meaning of the words in a way which the Legislature has not done.

Consequently, if these are not possessory suits, it seems to me that the Collector's Court, in dealing with suits under cl. 6, s. 23, is vested with full jurisdiction to enquire into the matter; and if it was necessary for the plaintiff's purpose in such suits, as between him and the zemindar, to set up a *mokurrari potta* under which he claimed to be entitled to

(1) B. L. R., Sup. Vol. 628.

(2) 8 W. R., 487.

possession, and that potta were proved to be valid, he would not only be entitled to possession, but to possession as a *mokurraridar*. It seems to me, therefore, in the present case, as between Backer Ali and the zemindar, and between persons claiming under them respectively, that the Collector's decision is a binding decision which the zemindar is not entitled now to dispute or re-open.

This being the present inclination of my opinion, and the authorities being in the state I mention, as also some other authorities which may be cited on either side, I think it preferable to refer the case to the decision of a Full Bench, and not to pass a final decision here.

MITTAR, J. (after stating the facts, and that he concurred in the order of reference to the Full Bench, continued):—In special appeal it has been urged, firstly, that the Judge is wrong in holding that a *maurasi* tenure was created by the potta in question; and 2ndly, that he is also wrong in holding that the plaintiffs are estopped by the decision of the Revenue Court in the former suit from denying the genuineness of that instrument. With reference to the first point, I am clearly of opinion that the learned Judge is right. If we assume the potta to be a genuine instrument, there can be no doubt whatever that it is a *maurasi* potta on the very face of it; and I do not, therefore, think it necessary to enter into any further discussion on this point. With reference to the second point, however, I am of opinion that the conclusion arrived at by the learned Judge is not correct.

I confess that I feel considerable difficulty in dealing with the doctrine of *res judicata* in this case. The only statutory provision which we have on the subject is that contained in the second section of our Code of Civil procedure, and I am bound to say that the decided cases are not altogether in harmony with one another.

It seems to me, however, to be quite clear that the provisions of s. 2 cannot be applied to this case. In order to bring a case within the operation of that section, three things must be shown; namely, first, that the parties to the two suits under comparison are the same; secondly, that the cause of action is

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the same; and thirdly, that that cause of action has been already heard and determined by a Court of competent jurisdiction.

It must indeed be conceded for the purposes of the present discussion, that the parties to this suit and those to the suit brought by Backer Ali are substantially the same, inasmuch as the defendants are the undisputed legal representatives of that individual. But the causes of action are manifestly different in the two cases. The cause of action in the former suit was the illegal ejectment of Backer Ali by the plaintiffs. But the cause of action upon which the present suit is brought is the wrongful withholding of possession by the defendants who, it is alleged by the plaintiffs, have no right to hold possession after Backer Ali's death, inasmuch as Backer Ali had no such right to transmit to them.

The phrase "cause of action," used in s. 2, is certainly not susceptible of a very accurate definition; but I think we may safely take it to mean the alleged infraction of right upon which a plaintiff comes to a Court of Justice for relief. This is the sense in which that expression has been used in the other sections of the Code, as, for instance, in s. 7, and I may add that it has been also used in that sense in the Statute of Limitations. This interpretation, however, would, to a certain extent, restrict the operation of s. 2. That section, it must be remembered, forms part of Chap. I, which treats of the jurisdiction of the Civil Courts, and the very first section of that chapter says that the Civil Courts are bound to take cognizance of all suits not barred by any express statutory enactment. I have referred to this circumstance merely for the purpose of showing that a plea under s. 2 is a plea of jurisdiction, and unless the conditions specified in that section are strictly fulfilled, the Court would be bound to take cognizance of the suit, whatever decision it may ultimately pass upon its merits. In this view, even a change in the position of the parties in the two suits would operate as a bar to the application of s. 2. Suppose, for instance, that the plaintiff in the second suit was defendant in the first: although the subject matter is the same in both the suits, the causes of action

would be necessarily different. The wrongful act complained of by the plaintiff in the former suit cannot be considered as the cause of action of the plaintiff in the second suit, and s. 2 would be necessarily inapplicable. If the second suit is based upon a state of facts which has come into existence since the decision of the first, that state of facts, if otherwise sufficient, might constitute a fresh cause of action. If, on the other hand, no such new state of facts has happened, the proper answer to the second suit would be, not that it is brought upon a cause of action already heard and determined by a Court of competent jurisdiction, and therefore barred by s. 2, but that there is no cause of action to support it. Thus, for instance, if the second suit is brought upon the alleged cause of action that the plaintiff has been ejected in execution of a decree duly passed against him by a competent Court in a previous suit brought against him by the defendant, the legitimate answer would be that the rights of the parties to the property in dispute have been already set at rest by a decision which has become final in all its legal consequences, and as the ejectment of a party in execution of a decree duly passed against him is not valid cause of action, the suit must fail, not upon the ground that its cognizance is barred by s. 2, but upon the ground that it has no legal foundation, as every suit must be based upon a proper cause of action. Suppose, for instance, that Backer Ali himself had been alive, and suppose, also, that a suit had been brought against him on the expiration of the year in which he was restored to possession by the Deputy Collector, upon the ground that he had no right to hold those lands permanently. Whether the plaintiffs could have succeeded in such a suit or not is a different question. But it is perfectly clear, that the cause of action would have been different from that determined in the former suit by the Deputy Collector; and the Court would have been bound to determine it upon its merits, in spite of the provisions of s. 2. The preceding observations are, I believe, sufficient to show that s. 2 has no bearing upon this case. But there is another mode in which the decision of a competent Court in a previous suit is used against the parties to that suit on a subsequent

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litigation between them,—I mean in the shape of an estoppel. The late learned Chief Justice of this Court seems to have thrown considerable doubts upon the propriety of introducing the doctrine of estoppels in this country in the judgment delivered by him in the case of *Mussamut Edun v. Mussamut Bechum* (1). That doctrine, it was observed, is one peculiar to the law of England. It is intimately connected with the English law of pleadings which has no existence in our Courts, and as its tendency is to shut out the truth, it may well be doubted whether those Courts, which are by their very constitution Courts of equity and good conscience, would be justified in adopting a doctrine which has such a tendency. But if we are at all to adopt this doctrine upon the ground of public policy or otherwise, we must adopt it with all the limitations and restrictions which the wisdom of its framers has engrafted upon it.

One of the leading authorities on the subject of estoppels is to be found in the celebrated case of *The Duchess of Kingston* (2). The chief propositions of law laid down by the learned Judges who were consulted in that case, are :—

“*First*,—That the judgment of a Court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive, between the parties upon the same matter, directly in question in another Court ;

Secondly,—That the judgment of a Court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidently in question in another Court, for a different purpose ;

Thirdly,—That neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidently cognizable, nor of any matter to be inferred by argument from the judgment.”

The first two propositions raise a distinction between Courts of concurrent and Courts of exclusive jurisdiction, which it is of the highest importance to bear in mind. This distinction is the basis of the decision delivered by the late learned Chief Justice

(1) 8 W. R., 175.

(2) 2 Smith's L. C., 6th edit., 679.

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in the case referred to by me, and I will, therefore, confine myself to the discussion of the question as to how far the case now before us is affected by it.

The learned Judge in the Court below says, "that as the Revenue Court would have jurisdiction in this case to eject the defendants, the previous decision of the Revenue Court is final and conclusive in this Court." But the learned Judge is evidently wrong in assuming that "the Revenue Court would have jurisdiction in this case to eject the defendants." That Court has jurisdiction, and it must be admitted exclusive jurisdiction, over "all suits to recover the occupancy or possession of any land, farm, or tenure, from which a ryot, farmer, or tenant, has been illegally ejected by the person entitled to receive rent for the same." But it had no jurisdiction whatever over a suit like the present, which is brought for the ejectment of parties who, if the plaintiff's case is a true one, cannot be regarded in any other light than that of trespassers. A suit by a landlord to eject a tenant, or to cancel a lease, was cognizable by the Revenue Court under cl. 5, s. 23, Act X of 1859, provided that it was brought upon the ground of non-payment of rent, or of breach of the conditions of the lease; but there is no provision in that Act for a suit of this description. It is clear, therefore, that, so far as this suit is concerned, the Court of the Deputy Collector cannot be regarded either as a Court of concurrent, or of exclusive jurisdiction; and hence it follows that the decision of that Court in the suit brought by Backer Ali cannot be treated as an estoppel in the present litigation. Suppose, for instance, that the Deputy Collector had found the potta to be a genuine instrument in a paltry suit for arrears of rent,—could it have been possibly contended that that decision would have operated as an estoppel in a suit brought by the plaintiffs for the land itself, which would be undoubtedly a suit within the exclusive jurisdiction of the Civil Court. "It is clear, therefore," observed the late learned Chief Justice in the case already cited, "that to render a judgment in such cases conclusive, the Courts must be Courts of concurrent jurisdiction. The validity of an instrument involving a title to lands worth lacs of rupees might have to be tried for some purpose in the Court

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of Deputy Collector, with an appeal to the Collector, or before a Small Cause Court from which there is no appeal. If the view taken by Campbell, J., is correct, this decision would be conclusive upon every other Court in which the validity of the same deed might come in question for an entirely different purpose, and in a claim for a very large amount. It appears to me, therefore, that the rule which is laid down, namely, that to render a judgment of one Court, between the same parties, upon the same point, conclusive in another Court, the two Courts must be Courts of concurrent jurisdiction. Concurrence of jurisdiction is a necessary part of the rule which creates an estoppel in such a case."

But the third and last proposition seems to be equally fatal to the application of the doctrine of estoppels in this case. Let us consider for a moment what was the question which the Deputy Collector had directly before him in the suit brought by Backer Ali. That question was, I apprehend, nothing more than this, namely, whether Backer Ali had been illegally ejected from his tenure by the present plaintiff. This view is fully supported by the Full Bench decision of this Court in the case of *Gooroodoss Roy v. Ramnarain Mitter* (1). In that case it was expressly laid down that cl. 6, s. 23, Act X of 1859, refers only to possessory actions on the ground of illegal ejectment; and that the Civil Courts are, therefore, fully competent to take cognizance of suits brought by tenants for the recovery of their tenures on proof of title, notwithstanding the concluding words of s. 23, Act X of 1859, which gave exclusive jurisdiction to the Revenue Courts over all suits described in that clause. The learned Judge says that this case has no bearing upon the point now in dispute. But the principle upon which it was decided is of the utmost importance, inasmuch as it shows clearly that a suit under cl. 6, s. 23, Act X of 1859, being essentially a suit of a possessory character, the only question which can directly arise before the Revenue Courts in those suits, is the question of illegal ejectment. It is true that the Collector has to try

[(1) B. L. R., Sup. Vol., 628.

whether there is a subsisting relation of landlord and tenant between the parties to such a suit before he can assume jurisdiction over it; but that is a matter purely incidental to the main question,—namely, that of illegal ejectment.

It has been said that the Full Bench decision, just now cited, has been virtually overruled, or at least modified, by a subsequent Full Bench case (1); in which it has been held that, before a plaintiff can succeed under the provisions of cl. 6, s. 23, Act X of 1859, he is bound to show that there is a subsisting relation of landlord and tenant between him and the defendant. But, on closer examination, it will be found that there is no real conflict between the two cases. Cl. 6 referred expressly to suits brought by tenants for the recovery of lands from which they had been illegally ejected by their landlords, and the Collector must, therefore, find that the case before him is really the case of a tenant before he can assume any jurisdiction over it. This circumstance, however, cannot affect the validity of the position, that the question of illegal ejectment is the only question which is directly cognizable in such a suit. The Deputy Collector had full and ample jurisdiction to try whether there was a subsisting relation of landlord and tenant between the present plaintiffs and Backer Ali; and yet it must be conceded that the determination of that question was merely incidental to the purposes of a suit which was essentially a suit of a possessory character as held by the first Full Bench decision. When the Legislature gives jurisdiction to a particular tribunal to try a particular class of suits, it would necessarily be competent to that tribunal to try all questions whether of law or of fact, upon which the right determination of those suits may depend. But it would not, therefore, follow, as a matter of course, that the decision of every question determined by such a Court in the course of such a suit, is to be considered as the decision of a question directly raised within the proposition under consideration.

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(1) *Prosonno Kumar Pal Chowdhry*; Case No 36 of 1866; 23rd *dhry v. Koylas Chunder Pal Chowdhry* September 1867.

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Thus, for instance, in a suit for mesne profits instituted in the Small Cause Court, it might be sometimes necessary for that Court to enter into the most complicated questions of law and fact affecting the title to the land for which those mesne profits are claimed. But it would be obviously erroneous to contend that the decision of any of those questions by the Small Cause Court can be set up as a bar, or as conclusive evidence, in a subsequent litigation between the parties for the land itself, or that that decision is to be considered as a direct decision upon the question of title. Suppose, again, that the Revenue Court has decided in a suit for arrears of rent, valued at a few rupees, that the defendant has bound himself by a kabuliat to pay a certain amount of rent to the plaintiff for a certain number of years, and suppose also that the kabuliat is false, the defendant himself being the proprietor of the land to which it purports to relate. Would the decision of the Revenue Court on the question of tenancy be considered such a direct decision upon the point of title as to operate as an estoppel in a subsequent suit brought by the defendant for the declaration of his right, which would be admittedly a suit within the exclusive jurisdiction of the Civil Court? It would certainly be beyond the power of the Civil Court to give him any relief in the matter of the arrears already adjudged against him by the Revenue Court, for the Revenue Court had exclusive jurisdiction over that matter. But there would be nothing in the decision of the Revenue Court upon the question of tenancy to prevent the Civil Court from making a binding declaration that there was no relation of landlord and tenant between the parties, and thereby to save the supposed tenant from any further molestation by his opponent.

It is further worthy of remark that however necessary it might have been for the Deputy Collector, under the Full Bench decision just now cited, to determine the question of tenancy before he could give to Backer Ali the relief prayed for by him, no question relating to the precise nature and duration of Backer Ali's holding could have been or was directly raised before the Deputy Collector for trial. Backer Ali might have alleged and failed to prove that he was a

maurasidar, and yet the Deputy Collector would have been bound under the first Full Bench decision to restore him to possession, if he had shown that there was a subsisting relation of landlord and tenant between him and the present plaintiffs, and that the latter had ejected him contrary to law, say for instance, by violating the provisions of s. 78 of Act X of 1859 or by turning him out neck and crop in the middle of the year without any previous notice, or any other legal proceeding whatever. Can it be contended that the present plaintiffs could not have sued him in the next year in the Civil Court upon the ground that there was no longer any relation of landlord and tenant between them and him?

It has been said that the Deputy Collector's decision ought to be considered as final, at least with reference to the genuineness of the potta in question. But this argument is manifestly untenable. The potta is a mere matter of evidence, and it is beyond all question that a mere matter of evidence cannot be put in issue. A disputed state of facts might legitimately form the subject of an issue. But it would be just as improper to put in issue the documents which the parties have filed in support of their respective allegations, as it would be to put in issue the veracity of the witnesses who are summoned to depose to those allegations. The evidence of a witness as to the existence of a particular state of facts is just as much a matter of evidence as a corresponding document; and I do not, therefore, think that we ought to make any distinction between them in framing the issue. The issue of tenancy was, no doubt, raised in the suit brought by Backer Ali, and the *maurasi* potta might have been put in by him for the purpose of proving the affirmative of that issue. But the opinion of the Deputy Collector on the genuineness of the potta can no more be treated as the decision of an issue directly raised upon the point, than the opinion of that officer upon the veracity of the witnesses examined by Backer Ali.

The foregoing remarks clearly show that the matter now in dispute between the parties was neither directly, nor completely, raised before the Deputy Collector in the former suit, and the case would therefore fall within the exception specified in the

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third proposition above referred to. This view seems to be fully supported by the remarks made by Mr. Taylor in ss. 1520 and 1521 of his work on Evidence. I do not wish to quote these sections *in extenso*, but I will simply refer to one of the cases mentioned by that learned author by way of illustration :—In an action for debt on a bond, the defendant had pleaded that there was an usurious agreement between the plaintiff and himself, and that the bond was given in pursuance thereof; and issue having been joined on a traverse of this statement, the defendant had a verdict; “ the Court held that, in a subsequent action on a collateral security for the same debt, the plaintiff was not estopped by the former judgment from disproving the usurious agreement, inasmuch as the existence of such agreement had not been directly in issue in the action on the bond.”

For the above reasons I am of opinion that the decision of the lower Appellate Court ought to be reversed, and that this case should be remanded to that Court for the determination of the question, namely, whether the defendants are entitled to hold the lands in dispute as *mokurruridars* under the plaintiffs, subject however to the result of the reference to the Full Bench made by my learned colleague, in which proposal I concur.

Mr. Woodroffe (Mr. Rochfort and Baboo Gopeenath Mookerjee with him) for the appellants.

Mr. Twidale for the respondents.

Mr. Woodroffe, for the appellants, contended that the suit was maintainable. The decision of the Deputy Collector upon the question of the genuineness of the potta was not conclusive—*Mussamut Edun v. Mussamut Bechun* (1). The Revenue Courts have no power to try questions of title, except those arising from the relation of landlord and tenant—*Prosonocoamar Paul Chowdry v. Koylas Chunder Paul Chowdry* (2). The cause of action in the present suit is not the same as was the cause of action in the suit heard by the Deputy Collector. The

(1) 8 W. R., 175.

(2) Case No. 236 of 1866 ; 23rd September 1867.

cause of action in the suit before the Revenue Court was the illegal ejectment of the ryot by the zemindar. The cause of action in the present suit is that the defendants are trespassers and are withholding possession from the plaintiffs. The cause of action is not the same, and therefore s. 2, Act VIII of 1859, does not bar the suit—*Baboo Mohan Lal Bhaya Gyal v. Lachman Lal* (1). Under cl. 6, s. 23, Act X of 1859, the Revenue Courts have jurisdiction only to try possessory actions on the ground of illegal ejectment, and not suits where the plaintiff sets out a title and seeks possession on proof of that title—*Gooroodoss Roy v. Ramnarain Mitter* (2). The present suit is brought on a cause of action different from the cause of action which was the subject of the suit in the Revenue Court; therefore, the decision of the Deputy Collector does not conclude the parties. The learned Counsel also cited *Hunter v. Stewart* (3), *Jackson v. Spittall* (4) and *Cherry v. Thompson* (5).

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Mr. Twidale, for the respondents, contended that the decision of the Deputy Collector was conclusive. The case of *Mussamut Edun v. Mussamut Bechun* (6) is not applicable to the present suit. Under cl. 6, s. 27, Act X of 1859, the Collector had jurisdiction to try whether the ryot was the holder of a *maurasi* tenure or not. The present suit is not a suit for arrears of rent. The ryot came into Court on the allegation that he was the holder of *maurasi* tenure, and claimed possession on that title. The zemindar denied the *maurasi* title. The legitimate issue was, "Was the *maurasi* potta genuine?" The issue was raised, and the title of the ryot was determined by a Court of competent jurisdiction—*Madur Khan v. Wooma Moyee Dabee* (7). It cannot again be the subject of a civil suit—*Ooma Churn Dutt v. Beckwith* (8). The case of *Gooroodoss Roy v. Ramnarain Mitter* (2) is explained in *Jonardun Acharjee v. Haradhu*

(1) 5 B. L. R., 663

(2) B. L. R., Sup. Vol., 628.

(3) 31 L. J., Ch., 346; S. C., 4 De G. F. & J., 168.

(4) 5 L. R., C. P., 542.

(5) 7 L. R., Q. B., 573.

(6) 8 W. R., 175.

(7) Marsh., 389.

(8) 5 W. R., Act X Ral., 3.

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Acharjee (1). The decision in *Chowdhari Nilkanth Prasad Singh v. Dignarayan Singh* (2) and *Huro Lall Saha v. Sree Tirthanund Thakoor* (3) are applicable to the present case. The doctrine of estoppel laid down in *The Duchess of Kingston's* case (4) applies to cases tried under Act VIII of 1859—*Khugowlee Sing v. Hossein Bux Khan* (5). The question having been decided by a Court of competent jurisdiction cannot again be raised in the Civil Court. The decision of the Deputy Collector is conclusive.

Mr. Woodroffe in reply.

The following judgments were delivered :—

COUCH, C.J. (AINSLIE, J., concurring) (after stating the facts continued).—The case illustrates the defects of the present system of special appeal. There is a very strong probability, to say the least, that, if the Judge had determined the question whether the potta is genuine, he would have found it to be so; and that, if this Court had power to decide the question of fact, it would find so; but the special appeal is brought for an error in law in holding that the previous decisions is conclusive. The Division Court has been unable to come to a decision upon this question, and the Full Bench has to decide it. Under a better procedure, the case would be decided on its merits, and this question would most probably be an immaterial one. It must however now be answered.

The rule applicable to it is laid down in *The Duchess of Kingston's* case (4):—first, that the judgment of a Court of concurrent jurisdiction, directly upon the point is, as a plea, a bar, or as evidence conclusive, between the same parties upon the same matter, directly in question in another Court, secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between

(1) Case No. 687 of 1867; 29th (3) *ante*. p. 437, note.

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(4) 2 Smith's L. C., 6th edit., 679:

(2) 1 B. L. R., A. C., 30. (5) 7 B. L. R., 673.

the same parties, coming incidently in question in another Court for a different purpose. Mitter, J., in his judgment, after calling this an estoppel, says :—"The late learned Chief Justice of this Court seems to have thrown considerable doubts upon the propriety of introducing the doctrine of estoppel in this country, in the judgment delivered by him in the case of *Mussamut Edun v. Mussamut Bechun* (1). That doctrine, it was observed, is one peculiar to the law of England. It is intimately connected with the English law of pleadings which has no existence in our Courts, and as its tendency is to shut out the truth, it may well be doubted whether those Courts, which are by their very constitution Courts of equity and good conscience would be justified in adopting a doctrine which has such a tendency." These remarks oblige me to quote from the judgment of the Judicial Committee in *Khugowlee Sing v. Hossein Bux Khan* (2). After quoting the well-known passage from *The Duchess of Kingston's* case (3) their Lordships say :—"There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the Civil law, and it is perfectly consistent with the second section of the Code of Procedure under which the case was tried, which says : (reads)." I have carefully read the report of the case of *Mussamut Edun v. Mussamut Bechun* (1), and I have not found it anywhere stated that the doctrine "is one peculiar to the law of England." Upon the remark that it is intimately connected with the English law of pleadings (meaning, I presume, common-law pleadings), and that it may well be doubted whether our Courts would be justified in adopting it, I will only observe that the English Courts of equity have adopted it, as may be seen in *Barrs v. Jackson* (4). Vice-Chancellor Knight Bruce, in his judgment in that case, quotes various passages from the Civil law, showing the reason of the rule. That the judgment of a Court of competent jurisdiction upon a question directly raised before

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1 8 W. R., 175.

(2) 7 B. L. R., 673, at p. 678.

(3) 2 Smith's L. C., 6th edit., 679.

(4) 1 Phil., 582 ; S. C. in Court.
below, 1 Y. & C., Ch. R., 585.

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t shall be accepted between the parties to the suit as true, seems to me to be a rule which should be adopted in our Courts. S. 23 of Act X of 1859 gave jurisdiction to the Collectors in certain suits, and amongst them, by cl. 6, in all suits to recover the occupancy or possession of any land, farm, or tenure, from which a ryot, farmer, or tenant, has been illegally ejected by the person entitled to receive rent for the same. Mr. Woodroffe, who appeared for the appellants, relied upon the decision of a Full Bench in the case of *Gooroodoss Roy v. Ramnarain Mitter* (1), and also argued that "illegally ejected" means ejected otherwise than by due form of law. In the Full Bench case, the Chief Justice, delivering judgment, said :—"We think that the words 'suits to recover the occupancy or possession of any land,' &c., in cl. 6, s. 23 of Act X of 1859, refer only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title, and seeks to have his right declared and possession given him in pursuance of that title," Backer Ali's suit was to recover possession, and he alleged that he had been dispossessed by the plaintiffs by proceedings taken in execution of a decree against another person, which would be clearly illegal. I have no doubt that it was a suit within cl. 6 of s. 23; and as the plaintiff alleged that he held under a *maurasi* lease, it was necessary for the Deputy Collector to determine whether the lease was genuine. I must here observe that concurrent jurisdiction in my opinion refers to the matter decided upon, and it is not necessary, as Mitter, J., seems to think, that the Court whose judgment is to be conclusive should have been able to entertain the suit in which it is to be used. If it were so, a person who had sued another in the Small Cause Court of Calcutta for a debt, and obtained a judgment, could not use it in a suit in the High Court against the same person as proof that the latter was indebted to him, if the suit in the High Court was of such a nature as not to be cognizable by the Small Cause Court.

It appears to me that the question referred to us must be determined by considering what the point upon which the

(1) B. L. R., Sup. Vol., 626.

judgment in the suit before the Deputy Collector was given was. The suit was to recover possession of land from which a tenant had been illegally ejected. The Deputy Collector had to determine two questions :—Was the plaintiff a tenant of the land ? Had he been illegally ejected by the person entitled to receive rent for it ? To determine the first of these it was necessary for him to find whether the alleged lease was genuine : but the real judgment in the suit was that the plaintiff was a tenant, the potta being the proof of it. The Deputy Collector had no jurisdiction to give effect to the potta as a permanent title ; he could only use it as showing that, at that time, the plaintiff had a right to the possession of the land. It was laid down by Lord Ellenborough in *Outram v. Morewood* (1) that a judgment is final only for its own proper purpose and object, and no other. The suit now before the Court is against the heirs of Backer Ali, whose case is that he had a *maurasi* potta ; but the Deputy Collector had not power in the suit before him to adjudge that the tenancy was hereditary, and if his judgment is to be taken as being directly on that point, his is not a Court of concurrent jurisdiction. His finding upon the potta, except so far as it established the right of Backer Ali to the possession of the land when he was ejected, must be considered a finding upon a collateral matter.

In my opinion, therefore, the question referred ought to be answered in the negative.

JACKSON, J.—I desire only to say that I do not dissent from the conclusion arrived at in the judgment which has just been delivered. The inclination of my own mind has been, as the observations which I made in referring the case would show, in the other direction, and I confess that I have not yet felt sufficiently confirmed in the opinion which is now that of the majority of the Court to state it in language of express assent.

PHEAR, J.—This case is so nearly parallel with the case of *Mussamut Edun v. Mussamut Beckun* (2), that the reasons which I then gave for my judgment would, by the substitution of the

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(1) 3 East., 357.

(2) 8 W. R., 175.

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word "potta" for "bond," serve to explain almost precisely the view which I take on the present occasion.

The cause of action upon which the present plaintiffs sue is that the defendants are wrongfully in possession of the plaintiffs' land, and are wrongfully withholding it from them. The answer of the defendants is that they are holding the land under a potta which is *maurasi* in its terms, and was granted to them by the plaintiffs. Thereupon the plaintiffs wholly deny the genuineness of the alleged potta, and require that an issue on this point be raised and tried between them and the defendants. The defendants maintain that this cannot be done, because an issue as to the genuineness of this very document was raised between them and the present plaintiffs in a former suit, which was brought in a Court competent to decide the issue, and that it was then determined against the present plaintiffs. It is admitted by the plaintiffs that this was so, and the question before us is whether or not in view of the former determination of the issue, the same issue can now be raised and tried a second time between the same parties.

It appears that the former suit, which is referred to, was a suit in the Collector's Court, wherein the relative situation of the parties was reversed: the ancestor of the present defendants, namely, Backer Ali, sued the present plaintiffs, the Munduls, alleging that he was entitled to possession of the land (which is now the subject of suit) as their tenant under the potta now in question, and that they had illegally ejected him; on this ground he sought the aid of the Collector to restore him to possession. The Munduls denied the genuineness of the potta: the question thus raised, whether or not the potta was genuine, was decided against them, and the Collector gave Backer Ali possessions.

Now it must be observed at the outset that the Collector's Court was a Court of limited jurisdiction, and that it had no power to determine between the parties a question of right to the land larger than the bare right to possession. It so happened that the plaintiff's right to possession, as he alleged it, was clothed with *maurasi* incidents, but the Collector's Court had no authority to determine whether such incidents existed or not; and indeed

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it is for this very reason that the Munduls are undoubtedly entitled, notwithstanding the Collector's decision against them in the former suit, to come into the Civil Court to have the question as to the *maurasi* right tried in the present suit. If they are hereto be successfully met with the objection that the Collector has already finally determined the question of the validity of the potta, then, it is obvious, the result is that the Collector has indirectly, if not directly, determined a question between the parties which was beyond his powers, and has in effect ousted the Court of superior jurisdiction; for the latter will have nothing left to it, but to, in effect, register the Collector's decision. This clearly cannot be right. And the explanation is to my mind furnished by the discussion of the matter, which I offered in *Mussamut Edun v. Mussamut Bechun* (1). I will not now go over the same ground again. I will simply confine myself to saying very shortly that I think the decision of the Collector upon the issue which is now before the Court, although he was unquestionably competent to try that issue for the purposes of the suit before him, did not effect a *res adjudicata* between the parties for all other purposes, and this for both the reasons given by Sir W. D. Grey in *The Duchess of Kingston's* case (2); first the Collector had not concurrent jurisdiction with the Civil Court, to the full extent of the matter involved in that issue; second the issue as to the execution and authenticity of the potta was a question of evidence collateral to the matter which the Collector had to determine.

I will add that, while it is no doubt most important in this country, as in every other, to give as much finality as possible to judicial determination of matters of dispute between parties, it is specially necessary, in view of the inefficiency very generally displayed by our Indian Courts, in the investigation and ascertainment of facts, that we should be watchful not to shut out a litigant, without good reason, from an opportunity of showing the truth of his case.

I think the question put to us should be answered in the negative.

(1) 8 W. R., 175.

(2) 2 Smith's L. C. 6th edit., 679.

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MARKEY, J.—In this case I also would answer the question put in the negative ; but I base my opinion entirely upon the peculiar character of the Court in which the former suit was tried. It was a Court the jurisdiction of which is defined by s. 23 of Act X of 1859. In some of the suits enumerated in that section, it is obvious that questions of title must sometimes arise ; and it also appears from s. 103 that the Legislature contemplated that these questions would arise, and made special provisions in case they should arise, that an appeal should lie to the ordinary Civil Court. It might, therefore, have been thought that the Legislature considered that questions of title could be finally adjudicated upon by suits instituted in these Courts. But the Privy Council have held, in the case of *Khugowlee Sing v. Hossein Bux Khan* (1), that the decision of a Collector in such a Court upon a question of title in a suit brought under cl. 2 of s. 23 of Act X of 1859 is not a decision of a Court competent to adjudicate on a question of title. It is true that this is only one of the reasons given for not treating the Collector's decision as conclusive in that case. It is true also that the suit which the Collector had tried in that case was for rent under s. 2, whereas this was to recover possession under cl. 6. But the expression of opinion as to the competency of the Collector is clear and distinct, and is in accordance with the opinion of high authority which have been expressed in this Court, as is shown in the judgment of Mitter, J. Nor is it possible to say that the Court which is incompetent to adjudicate upon questions of title in a suit for rent, is competent to do so in a suit for possession. The ground of incompetency of these Courts, as pointed out by the Privy Council, is the special and summary character of their jurisdiction.

Upon these grounds, I answer the question put in the negative.

(1) 7 B. L. R., 673.

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Phear.

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Hindu Widow, Estate of, as Heiress of her Son—Suit for partition—Consent decree—Family Arrangement—Estate given to be held in Severalty absolutely—Bengali Bill of Sale.

M, a member of a joint Hindu family, died, leaving three sons, *K*, *G*, and *D*, and a widow, *R*, who was mother of *G* and *D*. *G* having died, *R*, claiming as mother and heiress of *G*, joined with *D*, in bringing a suit for partition against *K* and the other members of the joint family. The decree in the suit, which was made by consent of all parties, declared *R* and *D* entitled to two equal twelfth parts of the joint estate, and *K* to one-twelfth share, and referred it to certain persons as arbitrators, and not as commissioners only, to make the award. The arbitrators allotted certain land to *R* and *D* as their two-twelfths of the joint immoveable property, "to be held by them in severalty absolutely;" to *K* they allotted other land as his own. twelfth share; and in pursuance of an arrangement come to between *K* and *R* and *D*, they directed *K* to sell and convey his one-twelfth share to *R* and *D*, on receiving from them the sum at which it was valued. *R* and *D* paid the money, and *K* conveyed his share to them by a Bengali bill of sale, in which, after stating that he conveyed it in accordance with the award, he added:—"Becoming from this day invested with my rights, you have become proprietors of the right of gift and sale. I have no further connexion with the said land. Paying the taxes, revenue, &c., to Government, and causing mutation of names, you will continue, with your sons and grandsons in succession, to enjoy possession in perfect peace."

In a suit brought by *K*, against the executor of *R*, to recover a moiety of the property awarded to her and *D*, and of the property conveyed to them by the bill of sale, upon an allegation that *R* took this property only as mother and heiress of *G*, and that, upon her death, it devolved upon him as *G*'s next of kin—

Held (reversing the decision of Macpherson, J.), that *R* took an absolute estate, and not merely a life-interest, both in the property awarded to her and in the property conveyed by the bill of sale.

Appeal from a judgment and decree of Macpherson, J., dated the 20th May 1873, declaring the plaintiff entitled to certain

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property which he claimed under the following circumstances:—
 Ramsoonder Bysack, a Hindu, died in 1832, possessed of considerable property, and leaving him surviving three sons and a grandson, who jointly took and continued in possession of his estate. The eldest son, Mahanund, died in 1860 intestate, and leaving three sons and a widow Rammoney Dossee, who was mother of the two younger sons, Goureeboll and Debendronath. Khetterpaul, the eldest son, and the plaintiff in this suit, was the child of another wife who had pre-deceased Mohanund. Goureeboll died immediately after his father, unmarried and intestate; and Debendronath died in 1870, intestate and without issue, but leaving a widow. In 1866, Debendronath Bysack, in his own right, and Rammoney Dossee, as mother and heiress of her deceased son Goureeboll, instituted a suit against Khetterpaul and the other representatives of Ramsoonder Bysack, for a partition of the joint estate, and for an account, as against Khetterpaul (amongst others), of the rents and profits thereof. In July 1867 a decree was made in that suit with the consent of all parties, which, after reciting that the parties had waived an account from the death of Ramsoonder to that of Mohanund, declared the plaintiffs entitled to two equal twelfth parts or shares of the joint estate, Khetterpaul, the plaintiff in this suit, to one equal twelfth part or share, and the other parties to certain specified shares; and it was referred to Muddun Mohun Chatterjee on behalf of Khetterpaul Bysack, Ram Chunder Bonnerjee on behalf of the other defendants, and Bycauntnath Bysack on behalf of the plaintiffs, as arbitrators, and not as commissioners merely, to make the partition, and to take an account from the death of Mohanund. The arbitrators on the 15th July 1868 made their award, wherein, after reciting the decree, they said:—

“And whereas the said parties to this suit mutually agreed to waive the taking of all accounts of the rents and profits of the joint estate since the death of Mohanund Bysack, and agreed that the sum of Rs. 125 should be paid to the plaintiffs in full of all claims by them in respect of the said rents and profits in manner hereinafter mentioned. Now, therefore, we the said Muddun Mohun Chatterjee, Ram Chunder Bonnerjee, and Bycauntnath Bysack

do hereby, with the consent of all parties, plaintiffs and defendants to the suit, award and direct that the sum of Rs. 125 be forthwith paid by the defendants to the plaintiffs Sreemutty Rammoney Dossee and Debendronath Bysack in full of all claims by them in respect of the rents and profits of the said joint estate in manner following, that is to say, that the defendant Chunder Seeker Bysack do pay to the plaintiffs Rs. 37-8; that the defendant Khetterpaul Bysack do pay to the plaintiffs the sum of Rs. 12-8; that the defendant Sibchunder Bysack do pay to the plaintiffs the sum of Rs. 37-8; and that the defendants Bacharam and Bhoobun Chunder Bysack do pay to the plaintiffs the sum of Rs. 37-8. We further, with the like consent, award and allot to the plaintiffs the three parcels of the joint immoveable estate which are fully described in the Schedule A annexed to this our award, which said our premises are valuable at Rs. 14,3000, as their two equal twelfth parts or shares in the said joint immoveable estate, to be held by them in severalty absolutely; and we further, with the like consent, direct the said plaintiffs forthwith to pay to the defendant Sibchunder Bysack the sum of Rs. 200, the difference of the valuation of the share allotted to the said plaintiffs over and above the share of the said Sibchunder Bysack, which sum we direct to be paid by the plaintiffs to the defendant Sibchunder Bysack. And it having been agreed that the plaintiffs should purchase from the defendant, Khetterpaul Bysack his one equal twelfth part or share of and in the said joint immoveable estate so allotted to him and comprised in the Schedule E, for the sum of Rs. 7,033-5-4, we do hereby award and direct that the plaintiffs do forthwith pay to the defendant Khetterpaul Bysack the sum of Rs. 2 000 in part payment of their purchase-money, for the premises so agreed to be purchased, and do pay the balance Rs. 5,033-5-4, being the remainder of such purchase-money, within one month from the time when the Court shall have passed judgment according to this our award, and that, upon such payment of the whole sum of the Rs. 7,033-5-4 having been made, the said Khetterpaul Bysack, as agreed, do immediately thereupon execute and deliver to the plaintiffs a legal conveyance of his share in the said joint immoveable property so allotted to him the said Khetterpaul Bysack and comprised in the Schedule E."

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The final decree was in accordance with the award. Rammoney and Debendronath paid the money; and, on the 19th September 1868, Khetterpaul conveyed the land allotted to him, and which was situated at Churuckdangah, to Rammoney and

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Debendronath by a Bengali bill of sale, in which, after stating that he conveyed it in accordance with the award, he added :—

“Becoming from this day invested with my rights, you have become the proprietors of the right of gift and sale. I have no further connexion with the said land. Paying the taxes, revenue, &c., to Government, and causing mutation of names, you will continue, with your sons and grandsons in succession, to enjoy possession in perfect peace. If at any time I, or any of my heirs, set up any claim of lien against you or any of your heirs, the same shall be null and inadmissible.”

Rammoney died in December 1871, leaving three daughters, and having previously made a will, in which she purported to deal with her property as absolute owner. She appointed the defendant Bolye Chund Dutt, who was the father of her son-in-law, and another person, executors of her will, but probate was taken out by the defendant alone.

The present suit was brought by Khetterpaul Bysack, against Bolye Chund Dutt, as executor of Rammoney, to recover possession of a moiety of the property allotted to Rammoney and Debendronath, and also of the land at Ohuruckdangah. With respect to the latter he alleged in his plaint that Rammoney and Debendronath had purchased it with the proceeds of the moveable, and part of the immoveable, property of the joint estate which had been allotted them in the partition suit ; and that the defendant, as executor of Rammoney’s will, had taken and retained possession of her estate. He submitted that Rammoney took the property only as mother and heiress of Gourceloll, and that, upon her death, it descended to him as Gourceloll’s next of kin ; and he prayed for a declaration of his title as such next of kin, for possession, for an account of the estate from Rammoney’s death, and for an injunction restraining the defendant from further dealing with the property.

The defendant, in his written statement, alleged as to the property awarded to Rammoney and Debendronath, that by the consent of all parties concerned, it had been allotted to them to be held by them in severalty absolutely ; that, as to the land at Ohuruckdangah, he did not know out of what funds it had been purchased, but he submitted that, by the operation of the

bill of sale, Rammoney obtained an absolute, and not merely a life-interest, in a moiety thereof.

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Evidence was given on both sides as to the source whence the purchase-money for the Churuckdangah land had been obtained, the plaintiff trying to show that it was bought with funds which were derived from the joint estate, while the defendant sought to prove that Rammoney's share of the purchase-money was paid from her separate property. Bycauntnath Bonnerjee, the sole surviving arbitrator, who was called on the defendant's behalf, stated that the parties to the award intended Rammoney to take absolutely, and not for the estate of a Hindu widow only, and that the arrangement for the sale of the Churuckdangah lands originated in Khetterpaul's objection to take that portion of the property.

MACPHERSON, J.—I think the plaintiff is entitled to what he prays for, both in respect of the lands especially allotted to Rammoney Dossee and Debendronath Bysack, and in respect of the land, No. 8, Churuckdangah Street, allotted to the plaintiff, and conveyed by him to Rammoney and Debendronath. The defence set up is based entirely on an inaccuracy in the frame of the decree in the partition suit in which Rammoney and Debendronath were the plaintiffs. In that suit Rammoney, as mother and heiress of her son Goureloll, joined as plaintiff with her surviving son, Debendronath, and prayed for a partition of the estate of Ramsoonder Bysack, deceased, and for allotment to them of a one-sixth share therein. As against the other members of the family of Ramsoonder Bysack, Rammoney had no *locus standi* before the Court at all, except as mother and heiress of Goureloll. The decree for partition was drawn up by consent, and simply declares that "the plaintiffs are entitled to two equal twelfth parts or shares" of the joint estate; that Khetterpaul Bysack (the plaintiff in this suit) is entitled to one equal twelfth part or share; and that the other defendants are entitled to certain other shares; and it directs a partition to be made between the parties in the shares aforesaid. Then, by the decree it was referred to certain persons, not only as commissioners of partition, but as arbitrators, to take an account and make the partition.

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The award eventually made by the commissioners and arbitrators was made upon the consent of all parties, who had come to an arrangement among themselves. The award gave and allotted to the plaintiffs, Rammoney Dossee and Debendronath, certain properties, valued at Rs. 14,300, "as their two equal twelfth parts or shares in the said joint immoveable estate, to be held by them in severalty absolutely ;" and to Khetterpaul Bysack (who was entitled to a share equal to that of Goureeloll or Debendronath, who were his half-brothers) land at Churuckdangah, valued at Rs. 7,000, was allotted as his one-twelfth share. The final decree of this Court was made according to the award. As regards the parcels allotted to Rammoney and Debendronath, it is now said that the interest taken by her in them was taken as her own property absolutely, and not merely as mother and representative of her son Goureeloll. There is no foundation whatever for any such contention except that the award says, that their shares are "to be held by them in severalty absolutely." The arbitrators were Bengalis, but drew up their award in English. The words used may possibly, in themselves be ambiguous and may possibly, if read alone, bear the construction the defendant would put upon them. But it is quite clear to me considering what Rammoney Dossee's position was, and what was the scope and object of the suit, that in using the expression "to be held by them in severalty absolutely," the arbitrators meant to say no more than that the parcels so allotted were to be held jointly by Rammoney and Debendronath according to their several interests in them, but in severalty as against the other members of the hitherto joint family. I construe the award exactly in the same way as if it had expressly stated that the share taken by Rammoney was to be held by her solely as representing Goureeloll, and that the share taken by Debendronath was taken by him in his own right.

The award further went on to direct, as carrying out an arrangement come to between the parties, that Khetterpaul, on receiving Rs. 7,000 from Rammoney and Debendronath, should sell and convey to them the land at Churuckdangah allotted to him. That direction was carried out. Rammoney and Debendronath paid the money, and on the 19th of September 1868, the

plaintiff executed a Bengali bill of sale, in which he said that he conveyed the land in accordance with the award, and added :— (*reads portion of bill of sale set out, ante, p. 462*). It is contended that the words used in this bill of sale show that the property was conveyed to Rammoney in her own right, and not as representing Goureloll, and that they debar Khetterpaul [from] claiming a moiety of the property as the share of Goureloll, whose representative Khetterpaul now is, Rammoney having died. But there is nothing special in the form of this bill of sale which is merely the form ordinarily used when the intention is to make a sale out-and-out of what I may call the fee-simple. The only matter in contemplation when this *kobala* was executed was to convey this land jointly to Rammoney, as heiress of Goureloll and to Debendronath, to be held by them in the same way as the land awarded to them by the arbitrators. It never was intended to settle any question as to the descent of the property after the death of Rammoney. An attempt has been made to prove that the Rs. 7,000 paid to Khetterpaul was Rammoney's *stridhan*: but I find as a fact, without the slightest hesitation, that the money paid for the land at Churuckdangh was not the *stridhan* or private money of Rammoney, but was money belonging jointly to Debendronath and Rammoney as representative of Goureloll.

On every point, the defence fails, and there must be a decree for the plaintiff. The will, of which the defendant is executor, was evidently concocted to meet this case,—that is to say, Rammoney was induced or allowed to execute the will in order to start the defence now set up. Considering who her executor is, I direct that, if there is any property belonging to the estate of Rammoney Dossee (as distinct from the share of Goureloll), the plaintiff's costs of this suit shall be paid by the defendant out of that property in priority to the defendant's own costs, on scale 2.

From this decision the defendant appealed.

Mr. Kennedy and Mr. Branson for the appellant.

Mr. Lowe and Mr. Bonnerjee for the respondent.

Mr. Kennedy.—The judgment of the Court below gives no effect

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1873 to the word "absolutely" used in the award. The fact of the
 BOYLE CHUND award being in a foreign language will not, in the absence of
 DUTT affirmative evidence to the contrary, lead the Court to infer
 a that the parties did not understand the meaning of the terms
 KHETTERPAUL used by them—*Prosunno Coomarr Ghose v. Tarrucknath*
 BYSACK. *Sirkar* (1). [COUCH, C. J.—There the will, which was a very
 old one, had been admitted to probate, from which circumstance
 having regard to the practice of the Court, we inferred that it
 must have been explained to the testator.] The final decree
 in the partition-suit was in accordance with the award, none
 of the parties suggesting any mistake. The parties in a parti-
 tion suit have full power to arrange amongst themselves what
 estate each shall take; they did so in the present instance
 Rammoney was entitled to the accumulations of Goureloll's
 estate—*Sreemutty Soorjeemoney Dossee v. Denobundoo Mul-*
lick (2) she waived her right to an account respecting them,
 and that was taken into consideration when the award was
 made. [PHEAR, J.—Though a widow may deal as she likes
 with accumulations, yet, if she does not spend the whole in her
 lifetime, will not the unexpended portion go with the *corpus*?
Mr. Bonnerjee.—Raja Chandranath Roy v. Ramjai Mazum-
dar (3) shows that would be the case.] It is difficult to reconcile
 the decision with *Gopeekrist Gosain v. Gungapersaud Gosain* (4),
 in which an attempt to assimilate a purchase by a Hindu in the
 name of his son to advancement in England was dissolved.
 But, however that may be, Rammoney did deal with the whole
 of the accumulations during her life. [PHEAR, J.—You will
 have to consider what would be the effect of her employing
 the accumulations in the purchase of property for herself.]
 The allegation that the Churuckdangah land was bought with
 the proceeds of the joint property allotted to Rammoney and
 Debendronath is unsupported by the evidence; but even if
 this were not so, the respondent could not succeed as heir to
 Goureloll. He was of the half-blood only. Debendronath, the
 whole brother, was the immediate reversionary heir—*Dayabhaga*,
 Ch. xi, s. 5, vv. 34 *et seq.*; and he and Rammoney together had

(1) 10 B. L. R., 267.

(3) 6 B. L. R., 303.

(2) 9 Moore's I. A., 123.

(4) 6 Moore's I. A., 53.

complete power of dealing with the property—*Sreemutty Jadomoney Dabee v. Sarodaprosomo Mookerjee* (1). Even if the respondent, upon a sale of the property by them, could have followed the sale proceeds in their hands, he would not be entitled to land partly purchased with it, but would, at the most, have a charge upon the land to the extent of the applied sale proceeds. If the respondent's contention be correct, and Debendronath had died in Rammoney's lifetime leaving a son, the respondent would succeed as Goureeloll's heir to the exclusion of Debendronath's son. But this would be both contrary to Hindu law and in derogation of his own grant contained in the Bengali bill of sale, whereby he conveys to Rammoney and Debendronath, their sons and grandsons, with powers of gift and sale. The only instance in which a person was allowed to set up a case contrary to his own deed was in *Faussett v. Carpenter* (2), which was disapproved of by Sir Edward Sugden in *Walpole v. M'Clin-tock* (3). Neither the award nor the bill of sale contains any words showing that the land was conveyed to Rammoney as heiress of Goureeloll. [PHEAR, J.—The respondent's contention must be that the *status* of the person to whom the grant was made must be taken to cut down the grant, apart from any expression of that *status* on the face of the deed.]

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Mr. Lowe for the respondent.—There was no consideration for the absolute interest said to have been given to Rammoney by the award. Although in the partition-suit a general account as against all the defendants was asked for, it was never suggested that Ketterpaul in particular was bound to account, or that he had received or wasted any of the joint assets. There is nothing in the submission to arbitration, when read together with the plaint in the partition-suit, to show that Rammoney was intended to take in any other capacity than as mother and heiress of Goureeloll. [COUCH, C.J.—The submission does not contain all that was agreed to; for instance, there is nothing in it empowering the arbitrators to direct the sale of the Churuckdangah land.

(1) Boul., 120, 382.

(2) 5 Bli., N. S., 75.

(3) 7 Ir. Eq. Rep., 353.

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As regards the consideration for giving Rammoney an absolute estate, it must not be forgotten that Khetterpaul had only a remote possibility of succeeding, Debendronath being alive.] That rather leads to the inference that giving up a contingency so remote was not in the minds of the parties at all, and that, in fact, it was not given up. [PHEAR, J.—Might not Debendronath, as next reversinary heir, have defeated Khetterpaul's interest by releasing his own rights? Rammoney would then have had the absolute estate. An alienation by a widow consented to by the then next reversioner would bar the claim of an ultimate reversioner.] If Debendronath had released to Rammoney, she would still have acquired the property by way of inheritance. A Hindu female can acquire property in two ways only, namely, as *stridhan* or by inheritance; and in the latter case, she can, under no circumstances whatever, get an absolute interest.

Mr. Bonnerjee on the same side.—A Hindu female cannot acquire an absolute estate except as *stridhan*. The property in this case came to Rammoney in none of the six enumerated ways. [PHEAR, J.—That enumeration is not exhaustive. Mr. Kennedy.—Clearly not; see the Vyavastha Darpana, 427.] Vyavastha 431 shows that the husband may deal with all his wife's property except what is derived from one of the six enumerated sources. [COUCH, C.J.—That is during his lifetime. PHEAR, J.—What would be the devolution of property given to a widow by a stranger?] To the husband's heirs: with respect to such property, a woman has no heirs. Marriage is not dissolved by the husband's death: if the wife survive, she exists only for the benefit of her husband's soul, and can only dispose of such property to secure that benefit.

The Court having directed the attention of the appellant's Counsel to the case of *Sreemutty Rabutty Dossee v. Sibchunder Mullick* (1),

Mr. Kennedy in reply.—The case mentioned by the Court is distinguishable from the present one. Rabutty, the reversioner

and plaintiff in that suit, was no party to the deed which purported to give her daughter-in-law an estate "for her own absolute and separate use." A release is always subject to limitation by the recitals—*Solly v. Forbes* (1), *Payler v. Homersham* (2), *Bac. Abr.*, tit. Release, K. In *Sreemutty Rabutti Dossee v. Sibchunder Mullick* (3), the Privy Council construed the deed by light of the evidence as to the intention of the parties.

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BYSACK.

Cur. adv. vult.

The following judgments were delivered :—

COUCH, C.J.—The plaintiff in this case is one of the sons of Mohanund Bysack, who died on the 24th of October 1860, leaving three sons, namely, the plaintiff, Goureloll, and Debendronath, and a widow Rammoney Dossee, whose executor and trustee is the defendant Bolye Chund Dutt. Mohanund Bysack was one of the sons of Ramsoonder Bysack, and he and his brothers who survived Ramsoonder Bysack and the son of a deceased brother formed a joint Hindu family. Goureloll Bysack died on the 20th October 1860, intestate and unmarried, and Rammoney Dossee succeeded to his share of the property. Debendronath Bysack died on the 20th of May 1870, leaving his widow the sole heiress and legal representative to his estate. The plaintiff would, on the death of Rammoney Dossee, have become entitled to the estate of Goureloll Bysack unless by reason of the award which I am about to notice, Rammoney Dossee became entitled to that estate absolutely, and not merely for the estate which a Hindu female heir would take. On the 12th of December 1866, Debendronath Bysack in his own right, and Rammoney Dossee as mother and heiress of Goureloll Bysack, instituted a suit in this Court for a partition of the estate and effects of Ramsoonder Bysack, the present plaintiff with other members of the family being the defendants; and on the 15th of July 1867, a decree was made, with the consent of the parties to the suit, for a partition, and it was referred to Muddun Mohun Chatterjee on behalf of Khetterpaul Bysack, and Ramchunder Bonnerjee on behalf of

(1) 4 Moore, 448; S. C., 2 Bro. & B., 38. (3) 6 Moore's I. A., 1.
(2) 4 M. & S., 423.

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the other defendants, and Bycauntnath Bysack on behalf of the plaintiffs, as arbitrators to make a partition of and division of the joint moveable and immoveable estate which was to be divided. The arbitrators so appointed made an award, which is dated the 15th of July 1868. It recites the decree and then says :—(*Reads portion of award set out, ante*, pp. 460, 461). The question is, what was the effect of this award upon the share of the property which was awarded to Rammoney Dossee ? It is said that they with the like consent (that is, with the consent of all parties, the plaintiffs and defendants) awarded the shares to be held by them (that is, by Debendronath Bysack and Rammoney Dossee) in severalty absolutely. These words would ordinarily mean, I think, that the share of each was to be taken by the two parties absolutely. Certainly that is the meaning of them as regards the share allotted to Debendronath, and the same expression is used with reference to the share of Rammoney Dossee. If it was intended that her share was to be held by her in a different manner, the proper way would have been to have stated it. But I think it does not depend merely on the construction which we should put upon the language of the award. It being stated by the arbitrators that what they did was with the consent of the parties, we are at liberty to see what the parties really consented to. The arbitrators do not profess to set out in their award the terms of the consent. They only profess to give effect to it. The effect they give is an allotment to these persons in severalty absolutely. To see what was intended, and what the arbitrators were authorized to do, we must look at such evidence as there is of what had been consented to. It is clear upon the face of this award that the intention of the parties was, and that they had agreed, that something should be done by the arbitrators beyond what they would have been authorized to do by a mere order in the partition-suit,—what they could not have done in a partition in the ordinary way. As to what was consented to, we have the evidence of one of the arbitrators. It is true he is the arbitrator who was named by the then plaintiffs in the suit of Debendronath and Rammoney ; but I do not see that any imputation was made against him of not giving a true account of the matter, nor was any attempt

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made to show that the consent of the parties was different from what he states. He said that they did not make enquiry as to the state of the accounts, but that the accounts were examined; "that there was no writing; only that which was ultimately settled was reduced to writing; that all the parties were present there, the plaintiff as well as the defendants, and the defendants begged and prayed of us to see that a settlement was 'made' (one of the defendants being the present plaintiff Khetterpanl Bysack). "It was ultimately settled for Rs. 125 on the agreement of the parties. We wrote out our award on the agreement of the parties. The settlement was that Rammoney and Debendro were to receive Rs. 125, and whatever portions of land they were to receive as their share, they were to have the right of sale and gift over. We three arbitrators settled that." Then he proceeded to state how it was that the share of Khetterpaul was directed to be purchased by Debendronath and Rammoney. He said:—"Khetterpanl refused to take it: he said he would take the dwelling-house at Nimtollah. Then the 'mooktear' of Rammoney and Debendro said the house belonged to their father; that they wished their father's name to remain connected with the house, so they would remain there. Debendro's mooktear said that Debendro and Rammoney should remain in that house: they said it belonged to their father, and the house should be known as belonging to their father. Khetterpaul is son of Mohanund by another wife. Rammoney and Debendro both said they wanted the house; so did Khetter. Ultimately Khetter said let money be paid me, so it was arranged money should be paid to him." Accordingly the award was so made. It appears to me then that these parties having obtained a decree for partition, and the estate being about to be divided, and the arbitrators having been appointed, did what is not unfrequently done; they came to an arrangement for a division of the property which would be most convenient to themselves, and most suitable for all parties. It was in the nature of a family arrangement, a very fair and proper one, and apparently what they all agreed to. According to this gentleman's evidence, the agreement was that the property should go to Rammoney, not for the limited estate which she would take as

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the mother and heiress of Goureeeloll, but she was to have an absolute power over it: and considering the state of the family at that time, it does not seem at all unreasonable that such an arrangement should have been made. It was under the circumstances a proper arrangement. I look upon this as a family arrangement, and upon the award as having been made to carry it out. The intention of this award, as well as the ordinary meaning of the language used, is to give to Rammoney her share of the estate, not for the interest which she would take as a female succeeding to property, but an absolute interest which she would have a power of disposing of by a will. That being my opinion with reference to the share allotted to her it follows that the case of the plaintiff must also fail as to the property which was purchased by her and Debendro-nath in accordance with the direction in the award; because the case of the plaintiff is that the property was purchased with the proceeds of the estate in which Rammoney had only a limited interest, and that the property purchased must be considered as submitted for the other. That fails, and it is not necessary for us to consider how far, supposing the plaintiff was right as to the share which was allotted to Rammoney Dossee, he has made out a case which would have entitled him to claim the whole of her share of the purchased property. I do not think he has made out such a case. He has not shown that the property was purchased with money which belonged to the family, and probably the utmost that he could have claimed, not in this suit, but in some other, would have been to have a charge on the purchased property for so much of the money expended in purchasing it as really belonged to the family estate. It is not necessary to determine that, because the plaintiff's case as to this part of the property claimed by him must follow the decision as to the other part.

I think the decree of the learned Judge must be reversed, and the suit of the plaintiff dismissed with costs.

I may add that the case of *Sreemutty Rabutty Dossee, v. Sibchunder Mullick* (1) is distinguishable from this in this

(1) 6 Moore's I. A. 1.

respect, that there all the persons whose consent would be necessary to alter the nature of the estate which the widow took were not parties to the instrument as they were here, and it would seem it was on that ground that the Judicial Committee, if not entirely, at least very considerably, came to the conclusion they did as to what interest the widow took in that case.

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PHEAR, J.—I entirely agree with the Chief Justice, and would only add that, in the course of my experience on the original side, I have met with many instances of consent-decrees being passed in partition cases wherein the interest of a female member of the family has been part of the matter determined, and as far as my memory serves me, the parties in those cases knew very well how to distinguish between the interest which was limited to a female taker, and the interest which was given absolutely to a male member of the family. By a rather curious coincidence I have before me at the present moment for consideration on a collateral matter a consent-decree (1), which was signed by me on the Original Side rather more than two years ago; and in that decree I find the words used, by consent of parties, are that one moiety or half part or share of the premises in suit should be allotted "to the plaintiff, to be held and enjoyed by her as a Hindu widow in the manner prescribed by Hindu law, and the other moiety or half part or share thereof to the defendant, to be held and enjoyed by him in severalty absolutely." I have certainly no hesitation whatever in agreeing with the Chief Justice that there is nothing in this case which ought to induce us to cut down words which, so far as we can judge, were used by the parties advisedly.

Decree reversed.

Attorney for the appellant: Baboo D. C. Dutt.

Attorneys for the respondent; Messrs. Trotman, Chatterjee, and Watkins.

(1) In a case of *Kistokaminee Dosses v. Mirtoonjoy Dutt*.

APPENDIX.

APPENDIX.

Before Mr. Justice L. S. Jackson and Mr. Justice Miller.

BISHONATH SURMA AND OTHERS (DEFENDANTS) v. SREEMUTTY SHOSHI
MOOKHEE (PLAINTIFF).*

1873
April 24.

Special Appeal, Point allowed to be raised in—Limitation.

Mr. R. E. Twidale and Baboo Aukhil Chunder Sen for the appellants.

Paboo Sreenath Banerjee and Romesh Chunder Miller for the respondent.

THE facts sufficiently appear in the judgment of the Court, which was delivered by

JACKSON, J.—This was a suit by the daughter to set aside an act of alienation made by her mother in 1855 and to have the daughter's reversionary right declared, notwithstanding such alienation, the mother being still living and 15 years having elapsed from the date of the alienation at the commencement of the suit. The lapse of this time seems to have escaped the notice of the Subordinate Judge. He went into the question of the necessity, or otherwise, of the alienation, and on that point he found in favor of the defendants. The case went on appeal before the District Judge, Mr. C. D. Field, and he, in discussing the plaintiff's right to recover, appears to have lost sight of the objection which was manifestly raised by the defendants that this suit was barred by limitation. The judgment of the District Judge, who reversed the decree of the Subordinate Judge, is now before us in special appeal, and the point of limitation is now raised. The very facts which would have supported, and which do support this plea of limitation, are raised in the grounds of special appeal, but curiously enough for another reason and in another shape. It is said, "that when the plaintiff admits that a sale was executed in 1855 at which time the purchasers got possession, that in execution of a decree against the purchasers, their rights were purchased by the second set of defendants, and that in execution of a decree against those second set of defendants, the property was purchased by your petitioners, and when there is no allegation of fraud as to these purchases, which are *bona fide* made, then the plaintiff's claim for a declaratory decree ought to have been dismissed on the ground of her long silence and acquiescence for a period of above 16 years." Although this point, therefore, was not directly taken in the grounds of special appeal, it

* Special Appeal, No. 804 of 1872, from a decree of the Officiating Judge of Chittagong, dated the 22nd February 1872, reversing the decree of the Officiating Subordinate Judge of that district, dated the 29th July 1871.

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seems to me from the very nature of the suit that it is one which ought to be allowed to be taken, and which therefore we have allowed to be taken. It appears that the plaintiff, the daughter, was not only in the same position in reversioner which she now holds, but she was actually a party to the legal proceedings ending in a decree, in part satisfaction of which the alienation complained of was made. It has been held in many cases by this Court that a party, desirous as a reversioner to obtain a declaration of his rights affected by a sale or gift made by a Hindu widow, must bring his suit within 12 years of the alienation, and that it is a remedy of a different description which is open to him after the death of the widow. Under these circumstances we have no choice but to reverse the decisions of the Courts below, and dismiss the plaintiff's suit with all costs.

Before Mr. Justice Macpherson.

1873
 May 22 & 29.

GEORGE v. GEORGE.

Alimony, Non-payment of—Attachment of respondent—Insolvent Act (11 & 12 Vict., c. 21), s. 49—Petition in Insolvency.

Mr. Lowe, on behalf of Mrs. G. P. George, applied *ex parte* for the attachment of her husband, J. George, under the following circumstances as set forth in an affidavit by Mrs. George:—That by two orders made in a suit brought by her for the dissolution of her marriage with the respondent, the latter was directed to pay her Rs. 120 a month by way of alimony, and to pay into Court the probable amount of her costs, to be certified by the taxing officer; that the probable costs were subsequently certified at Rs. 2,000; but the respondent having failed to deposit this sum was directed by a further order of the 31st March 1873 to pay into Court to the credit of the suit Rs. 300 monthly, out of which sum Rs. 120 was to be applied in payment of her alimony and the balance in payment of her costs; that the respondent, who continued in receipt of his usual income, wilfully neglected to obey this order, that since February 1873, she had received nothing in respect of alimony, and that, on the 3rd April 1873, the respondent filed his petition of insolvency. In his schedule the respondent entered the Accountant General as a creditor for Rs. 2,000, but made no mention of his liability for alimony, and he had not filed any accounts.

Mr. Lowe contended, on the authority of *Gonsalves v. Gonsalves* (1), that the filing of the petition did not discharge the respondent's liability to pay alimony. In *In re Rawlins* (2) and *Dicknes v. Dickens* (3), it was held that a discharge in bankruptcy operated as a discharge of an order for alimony—see also *The King v. Edwards* (4) and *Lees v. Newton* (5). But here the

(1) Ful. Rep., 392.

(4) 9 B. & C., 652.

(2) 12 L. T., N. S., 57.

(5) L. R., 1 C. P., 568.

(3) 31 L. J. Prob., 183.

respondent had not obtained his discharge, nor had he obtained *ad interim* protection. The debt was not entered in his schedule, and could not be proved—Insolvent Act, s. 49.

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MACPHERSON, J., made an order for attachment.

Attorney for Mrs. George : Mr. Fink.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

THE QUEEN v. GOOJREE PANDAY AND ANOTHER.*

1873
May 12.

Criminal Procedure Code (Act X of 1872), s. 280—Enhancement of Sentence.

THE facts are fully stated in the judgment of the Court.

The Junior Government Pleader (Baboo Juggodanund Mookerjee) for the prosecution.

The prisoners were undefended.

JACKSON, J.—The prisoners in this case, named Goojree Panday and Jadu Sein, were convicted, by the Court of Session at Midnapore, of a dacoity, and were sentenced, Goojree Panday to rigorous imprisonment for three years, and Jadu Sein to similar imprisonment for six months.

Upon the hearing of the appeal, the Junior Government Pleader appeared and applied to us to exercise the powers vested in the Court of Appeal by s. 280 of the Code of Criminal Procedure by enhancing the punishment which has been awarded against the prisoners. He represented that considering the gravity of the offence and the circumstances under which it was committed, and the place, and also the class of persons to which the complainant belonged, being a traveller to the shrine of Juggernath, and the necessity of protecting such persons, the Court ought to see that an adequate sentence was passed. This Court is empowered, both as a Court of Appeal and also as a Court of Revision, to enquire into the sufficiency of sentences passed by the inferior Courts. One contingency in which that power may be exercised is when the Judge, recognizing the heinous nature of the offence committed, yet considers that there are circumstances which go to mitigate punishment, or make the prisoner an object of leniency. In such a case no doubt the High Court may enquire into those circumstances, and although it is generally reluctant to do so, may take a different view of the discretion which ought to have been exercised, and may enhance the punishment. But there is another view of the case in which the duty of the High Court will arise, and that is,

* Criminal Appeal, No. 237 of 1873, from an order of the Sessions Judge of Midnapore, dated the 18th February 1873.

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PANDAY,

where no circumstances of mitigation have been set forth, and where without any sufficient reason the Court convicting the prisoner has awarded a punishment, which is in ordinary cases quite inadequate in respect of the offence committed. I think it is the duty of the High Court in such a case—a duty which the Legislature has in ss. 280 and 297 specially imposed upon us—to take care that the inferior Criminal Courts do not, by the infliction of lenient punishments, give, as it were encouragement to the commission of serious offences. Now the offence of which the prisoners in this case were convicted is one which, under s. 395 of the Indian Penal Code, makes them liable to transportation for life, or rigorous imprisonment which may extend to ten years, and section 397 provides:—"If, at the time of committing dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years." Now I find in the evidence of the prosecutor in this case, and that evidence is not disbelieved by the Judge, the statement "a woman who was travelling with us, had her foot hurt when the dacoits were pulling off her anklet,—a bannia, who was with us, and a garreewan were, struck on the head and hurt,—and another cartman was struck on the foot and a third carter had his leg broken," which amounts to grievous hurt; and if the Court below had considered, as it might have done, all these circumstances, then under s. 397 a less sentence than seven years' rigorous imprisonment could not be passed. Looking further into the case, the matter appears to have been a planned and preconcerted robbery on the part of the prisoners. The prosecutor, being one of a party of persons travelling to the shrine of Pooree, halted one afternoon for refreshment in a village place. The prisoners contrived to have access to them, and to get into their confidence in some degree, and doubtlessly observed where they kept their money, and afterwards attack them when they had gone a short distance on their journey at the dead of night with a number of malefactors sufficient to overcome all resistance. I think this is a case in which the sentence of three years' rigorous imprisonment passed by the Sessions Judge on the principal accused is wholly inadequate, and that, under the circumstances of the case, a punishment less than seven years ought not to have been passed on him. The sentence is enhanced accordingly.

In respect of Jadu Sein, the younger member, he is considered both by the Magistrate and the Sessions Judge to be a mere 'lad, who was led into the crime by inducement and persuasion; and although we may have a suspicion that his criminality was something more than this, I do not think there are sufficient grounds for us to interfere with the exercise of the Judge's discretion by directing that no severer sentence should be passed on this prisoner. In his case, therefore, the sentence will be affirmed as it stands.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

KHETTER MOONEE DASSEE v. SREENATH SIRCAR AND OTHERS.*

Criminal Procedure Code (Act X of 1872), ss. 332, 333, 334, & 530—Mode of recording Evidence.

1873
May 7.

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by.

JACKSON, J.—This is a case referred by the Officiating Sessions Judge of the 24-Pergunnahs, under s. 296, Act X of 1872, for the purpose of annulling, under the powers of revision [vested in this Court, the proceedings of the Joint Magistrate of Diamond Harbour, in that district, who, on the 12th February 1873, made an order for the attachment of some 57 bigas of paddy lands, and also gave orders relating to the disposal of the crops which had been previously cut by order of the said Joint Magistrate.

The Sessions Judge has pointed out four particulars on which he considers the proceedings of the Joint Magistrate irregular, and we have before us the Joint Magistrate's letter dated the 24th April last, in which he offers an explanation of those proceedings.

We consider that the proceedings complained of are so erroneous in one particular, that it is unnecessary to enquire in to the other grounds of objection. These proceedings were commenced under the old Code of Criminal Procedure. Under the rulings of this Court, applicable to the sections relating to cases of this sort in the old Code, it has been repeatedly held by the High Court that an adjudication on legal grounds as to the imminence of a breach of the peace was a necessary preliminary to the commencement of proceedings. S. 530 of the new Procedure Code supersedes those rulings; but of course the benefit of this section cannot be claimed in respect of any irregularity in the present proceedings. The error to which I refer, and which is an error under the present Procedure Code, is one, which I think vitiates the order of the Joint Magistrate. Although, as I have already stated, the proceedings were commenced under the old Code, yet the enquiries made and the order passed were under the present Code. S. 530, Act X of 1872, provides:—"Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information; but the question of possession must be decided on evidence taken before him." Chapter XXV deals with the mode in which such evidence is to be taken, and by s. 332 it is provided that, "in enquiries and trials (other than summary trials) under this Act, the evidence of the witnesses shall be recorded by the Magistrate or the Sessions Judge, as the case may be, in the following manner." Now from trials there are first excepted "summary trials," and in respect of these a distinct procedure, including provisions as to evidence, has been provided by

* Reference to the High Court under s. 296 of the Code of Criminal Procedure by the Officiating Sessions Judge of the 24-Pergunnahs.

1873 Chapter XVIII of the Code. Then "trials," after that exception, have been again subdivided into "summons cases" under s. 333 and other trials which are included with enquiries in the words "all other cases" in s. 334, and consequently it follows that we are to look to s. 334 and the following sections for the manner in which evidence is to be recorded in enquiries such as that now under consideration before the Magistrate. S. 334 directs that in such cases "the evidence of each witness shall be taken down in writing in the language in ordinary use in the district in which the Court is held, by or in the presence and hearing and under the personal direction and superintendence, of the Magistrate or Sessions Judge, and shall be signed by the Magistrate or Sessions Judge." Under this provision there is no exception whatever in favor of cases in which no appeal lies. The Joint Magistrate, therefore, was entirely in error in omitting to record the evidence in the mode prescribed by s. 334 and the following sections. This appears to us to be an error so material that under s. 297 we are bound to quash the proceedings, and set aside the order of the Joint Magistrate as being founded on no evidence.

In respect of the land it is unnecessary for us to make any further order and probably we have no power to make such order. It is always open to the Magistrate, if he thinks it necessary for the preservation of public peace, to bind parties who he considers are likely to break the peace by taking security or recognizance from them.

The money obtained by sale of the crops being now in deposit, it seems to us, from the necessity of the case, that it should remain so until the parties either come to a settlement of their dispute, or some of them establish a right to the land, which must be in the Civil Court.

Before Mr. Justice Pontifex.

1873 JOSHUA STEPHEN DEMELLO AND ANOTHER (PLAINTIFFS) v. L. P. D
April 8 & 10. BROUGHTON (DEFENDANT).

Illegitimacy—Letters of Administration—Administrator-General—Act XXIV of 1867 (The Administrator-General's Act), s. 15.

THE plaintiffs in this case, on the 17th March 1873, applied to the High Court for probate of the will of one Rose Dixon, to be granted to them as the duly appointed executor and executrix thereof. The defendant, who had on the 1st March 1873 entered a caveat in this matter, appeared and opposed the application. Under these circumstances, the Court (Macpherson, J.) ordered that the petition for probate presented by the plaintiffs should be treated as a plaint; that both parties should file written statements; and that the case should be set down on the list of causes for hearing. Accordingly, on the 8th April 1873, the case came on for final disposal. It appeared that Rose Dixon, the testatrix, was illegitimate, and the issue for trial was whether the document set up by the plaintiffs was her will. If the Court held it not to be

then, inasmuch as no other document was put forward as the will of Rose Dixon, it would follow that she died intestate.

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DeMELLO

v.

Broughton,

Mr. Lowe and Mr. John for the plaintiffs.

Mr. Evans and Mr. Lingham for the defendant.

During the hearing of the case, the Court suggested that the Crown should be represented on account of the illegitimacy of Mrs. Dixon.

Mr. Evans.—If the plaintiffs fail, the administrator-General will be able to administer—*Hogg v. Mendieta* (1).

Mr. Lowe.—The Administrator-General does not allege that Mrs. Dixon was illegitimate; if he had, then the case of *Hogg v. Mendieta* (1) might apply; neither has he applied for letters of administration. [POSTIFEX, J.—But he has entered a caveat. If the Administrator-General will undertake to apply for letters of administration under s. 224 of the Indian Succession Act (X of 1865) that would do.]

Mr. Evans.—He is prepared to do that, but irrespective of s. 224 of the Indian Succession Act, the Administrator-General would be entitled to administer this property by s. 15 of Act XXIV of 1867.

POSTIFEX, J., was of opinion that the Administrator-General would be entitled to letters of administration under s. 15 of Act XXIV of 1867, and that it was not necessary to make Government a party to the suit.

At a later stage in the suit, Mr. Evans drew the attention of the Court to a notification in the *Gazette of India* of the 5th April 1873 (2)

(1) 1 Boul. Rep., 622.

(2) Notification No. 2189, Fort William, the 31st March, 1873. Republished, No. 3099. The 15th December 1871.—The Governor-General in council is pleased to rule that the effects of illegitimates dying intestate, which have already become escheats to the Government since the Indian Succession Act, 1865, came into operation, as well as those which may hereafter become escheats, shall, after deduction of the expenses incurred and the established proportion of the Crown's share, be distributed in conformity with the aforesaid Act.

The following Financial Despatch from the Right Hon'ble the Secretary of State for India, No. 53, dated 12th February 1873, is published in the *Gazette of India* in continuation of Financial Notification No. 3099, dated 15th December 1871:—

Financial Despatch, No. 53, dated India Office, London, 12th February 1873, to His Excellency the Right Hon'ble the Governor-General of India in Council.

MY LORD,

Para. 1.—With reference to your Despatches in this Department of 20th December 1871, No. 845, and 20th December 1872, No. 468, I have to signify my approval of your proceedings in regard to the estate of the late Mr. P. T. Saunders.

2.—On the general question of dealing with estates of illegitimate persons, I approve of the course suggested by you being followed in all cases where all the parties clearly entitled to consideration are resident in India, but in case where no such claim is established within one year from the date of the escheat, or when the probable claimants are in this country, then the practice of remitting home those estates must be adhered to. ARGYLL.

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POSTIFEX, J.—The Succession Act does not say any thing about illegitimate persons. The notification can do no more than make public the fact that the Crown will do that in future which it has hitherto done.

Before Mr. Justice Kemp and Mr. Justice Phear.

1873
Jun. 4.

IN THE MATTER OF MOONSHEE SYUD ABDOL KADIR KHAN
(PETITIONER) v. THE MAGISTRATE OF PURNEAH.*

See also
12 B. L. R.
p. 285.

Powers of High Court—Non-compliance with Orders of High Court—Transfer of Proceedings—Jurisdiction—Criminal Procedure Code (Act X of 1872), ss. 64, 142 297, 389, 390, 391, 398—Revision of interlocutory Proceedings before Magistrate—Suspension of Proceedings—Order for Bail—Non bailable Offence—Warrant of Arrest—ommitment to Ocustody without Evidence taken—Remand without Evidence taken.

THIS case came before the High Court upon three rules which had been obtained on the 12th, 19th, and 28th of May by Mr. Ghose on behalf of Abdool Kadir Khan. The first rule directed Mr. Kemble, the Magistrate of Purneah, to send up to the High Court the record, processer, and papers in certain criminal proceedings against Abdool Kadir Khan, to stay proceedings in his Court until further orders of the High Court, and in the meanwhile to release Abdool Kadir Khan upon specified security. The second rule, called upon Mr. Kemble to show cause why he did not carry out the order involved in the former rule, Mr. Kemble having, after receipt of such rule, directed (in his capacity of Collector) the imprisonment of Abdool Kadir Khan upon certain fresh charges. And the third rule required Mr. Kemble to send up the records of the original proceedings, and also of proceedings upon such fresh charges instituted by Mr. Kemble before the Joint Magistrate, and under which Abdool Kadir Khan had again been committed to custody.

! The *Legal Remembrancer* (Mr. Bell) showed cause.

Mr. Ghose and Mr. Ameer Aly for Abdool Kadir Khan.

The facts of the case and the nature of the arguments appear fully from the judgments of the High Court. The argument on behalf of the petitioner was, at the instance of the Court, addressed simply to the necessity of transferring the proceedings, and rested entirely on the facts.

The following judgments were delivered :—

PHEAR, J.—Three rules which were issued by this Court on the 12th, 19th and 28th of last month respectively in the matter of one Abdool Kadir Khan have come before us to be adjudicated upon and disposed of. Before, however, I state the exigency of those rules, I will mention a few preliminary facts. In

* Rules Nos. 666, 704, & 740 of 1873.

1870 and 1871, or during a portion of those years, Abdool Kadir Khan was officiating head clerk of the Purneah Collectorate in the place of one Rooddro Chunder Mullick. Rooddro Chunder Mullick appears to have resumed his duties somewhere towards the end of the year, and shortly afterwards preferred three charges of embezzlement and two of forgery against Abdool Kadir Khan. These charges were enquired into by Mr. Weeks, who was at that time the Joint Magistrate of Purneah, and dismissed by him. This occurred in November 1871. Subsequently, however, the Sessions Judge took up the matter and directed the Magistrate to commit Abdool Kadir Khan for trial upon these charges, and pursuant to this direction of the Judge, Mr. Wyer, who then had succeeded Mr. Weeks as Joint Magistrate, issued a warrant of arrest; and Abdool Kadir was arrested under that warrant, I think in October 1872, and was committed for trial. He was tried at the Sessions Court and convicted on the 13th of January 1873. He was then sentenced by the Judge to 10 years' rigorous imprisonment, and to pay a fine of Rs. 1,000, or in default of payment to suffer rigorous imprisonment for a further period of two years.

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After Abdool Kadir Khan had been committed for trial by Mr. Wyer Mr. Kemble, who was then and still is Officiating Magistrate and Collector of Purneah, wrote a letter on the 30th December from himself as Collector to himself as Magistrate. The letter runs in these terms :—"To the Magistrate of Purneah. Sir,—I have the honor to forward to you herewith in charge of my head clerk, Baboo Sreenath Banerjee, the following papers connected with the late embezzlement by Syud Abdool Kadir Khan, at present in custody the Purneah jail, and who will be now charged with further embezzlement I shall be obliged if you will issue warrants for his arrest in case he should not be convicted on the charges on which he is to be tried on the 6th proximo

"The papers named above are :—

"1st.—An abstract, marked A, drawn up by Mr. Worgan, dated February 27th, 1872, showing that Abdool Kadir, between September 1870 and May 1871, cashed certain bills as subdivisional contingent and income tax bills, for larger sums than were billed for by the subdivisional officers, and remitted to those officers the smaller amount only. This charge will be proved by the bills cashed, the copies of the original bills from Kishengunge, and the copy bill-book from Arrariah, and by the covering letters and the cheque register, all of which are sent. These papers will show that fraud has been committed and my head clerk is instructed to prosecute Abdool Kadir, who cashed these bills, under s. 409 or other cognate sections.

"3rd.—With reference to items 9 in Mr. Worgan's list, charge of forgery will also be laid, as the original bill for Rs. 52-5-7 was not in this case destroyed, but as altered to Rs. 76-5-7 by manifest erasures. This charge will fall under Chap. XVIII of the Penal Code.

"4th.—Any of my officers will be ready at any time to attend your Court to prove the documents now filed."

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We have been informed that the schedule or papers annexed to this letter contain as many as twenty-four distinct items of charge. Mr. Kemble the Magistrate having been in this way informed by Mr. Kemble the Collector, of the fact of a criminal offence having been committed by some one within his jurisdiction, took cognizance of it, and having been further led, I suppose, by the same means, to suspect that Abdool Kadir was the offender, he dealt with the matter as Magistrate under s. 142 of the present Procedure Code, and then made over the case for enquiry to Mr. Wyer, the Joint Magistrate, and the result was that Mr. Wyer committed Abdool Kadir for trial on three out of the twenty-four charges mentioned or referred to in the letter. I feel myself obliged to say in passing that this really seems to me a very pitiful effort at disguising the fact that Mr. Kemble was in this matter the real prosecutor in his capacity of Collector, the prosecutor of Abdool Kadir Khan upon the charges contained in the letter of the 30th of December, and it would have been much more straightforward, to say the least of it, if he had frankly avowed himself prosecutor and laid a complaint before the Joint Magistrate in the usual manner. Abdool Kadir was tried upon these charges and convicted by the Sessions Court on the 11th of March 1873, and was further sentenced in addition to the sentence I have before mentioned, to a term of seven years' rigorous imprisonment. Against the conviction and sentences of the 30th of January and 11th of March respectively, the prisoner appealed to this Court, and was acquitted in the one case on the 25th of April, and in the other case on the 26th of the same month. An order for his immediate discharge from custody, so far as imprisonment under these convictions and sentences was concerned, was at once sent down to Mr. Kemble, the Magistrate of Purneah, who appears to have received the order in the afternoon of the 28th April. The Magistrate did not however promptly release the prisoner; before taking any step towards doing so, on the 28th, in his capacity of Collector, he sent a letter to Mr. Wyer, the Joint Magistrate, which runs thus:—"Sir,—As I hear that Abdool Kadir has been released by the High Court from the sentence recently imposed on him by the Session Court, I have the honor to request that you, will go on with the other charges noticed in my letter No. 1933, dated 30th December 1872, to the address of the Magistrate; I have the honor to be, &c." Upon this letter is endorsed by Mr. Wyer:—"A warrant will at once issue against Abdool Kadir Khan under s. 409, and be given to the Court-Inspector to be served." It also appears that, on the same day Mr. Wyer issued a formal warrant according to the terms of this endorsement. This having been done, Abdool Kadir Khan was brought up from the jail before Mr. Kemble as Magistrate, and then told of his acquittal by the High Court, and of the order for his release from jail. Mr. Kemble also at the same moment turned round to the Court-Inspector who was present—I need hardly say not by accident—and said to him:—"Has Mr. Wyer given you a warrant?" The answer was in the affirmative. Mr. Kemble then said:—"Take him back to jail." Abdool Kadir was taken. No. warrant of commitment to

jail or written order of remand was made out, nor was the prisoner taken before the Magistrate who had issued the warrant of arrest according to the exigency of the warrant. This is on the 28th. On the 29th the Court Inspector becoming, probably not without good reason, a little anxious that a written warrant of commitment should be made out, endorsed upon the original warrant of arrest this memorandum:—"Sir,—Yesterday at 6 P. M. prisoner Syud Abdool Kadir was released by order of the High Court, Calcutta. At the moment he was under this warrant arrested, and by order of the Magistrate of this district sent to hajut. But owing to the lateness of the hour, the purwannah for hajut was not sent. By this report, therefore I beg to solicit that an order may be passed by the huzoor for giving a purwannah [for hajut regarding the said defendant." Mr. Wye, endorsed under this the same day:—"That a purwannah for hajut be given and that the record in the matter of Abdool Kadir made over by the Magistrate, be, by a proceeding, sent for from the Sessions Judge," and there is a further endorsement to the effect that a proceeding had been sent. This I understand is the endorsement which constituted the written order of commitment. On the 1st of May the Joint Magistrate issued a further order in this matter. It seems that on that date Mr. Kemble wrote to Mr. Wyer in these terms:—"With reference to the case of Abdool Kadir Khan now pending before you, I have the honor to request a postponement for one week until I receive the judgment of the High Court in the cases previously decided." It does not appear that the prisoner was at this time brought before Mr. Wyer, or indeed that he was taken from prison before any Magistrate after the verbal commitment of Mr. Kemble on the 28th of April until the 8th^h May, a date to which I shall presently come. Mr. Wyer endorsed upon this application for adjournment made by Mr. Kemble:—"The case will be postponed to the 8th," and on the same day he made out a formal order of remand until the 8th of May. It must be remembered that up to this time no evidence whatever had been taken, and we have not been made aware that there were any reasonable grounds or any ground whatever for a remand other than the letter of Mr. Kemble written to Mr. Wyer, which I have just now read; and I suppose that the sole reason, the only ground, upon which the Joint Magistrate detained the prisoner in hajut was the ground afforded by such suspicion as was lurking in his mind in consequence of the original letter sent by Mr. Kemble to him on the 28th of April, strengthened, if it is possible, to conceive it to be strengthened, by this letter of Mr. Kemble written to him on the 1st of May asking for an adjournment. It is perhaps not to be wondered at that in this state of things the prisoner desired to see the warrant of arrest in order to ascertain, if possible, the offence with which he was charged, and the matter for which he was held in custody. He accordingly petitioned Mr. Wyer for a copy of the warrant of arrest; this application was refused. He then petitioned Mr. Wyer to let him have a copy of the order of refusal, this application also was refused. He then made an application to be admitted to bail, not alto-

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gether an unreasonable one, considering that several days had already passed, and yet from the first no evidence whatever had been taken, and indeed no specific accusation or charge made against him. This application was again refused. Abdool Kadir then applied to this Court by petition upon the foundation of the material facts which I have just been relating, set forth in an affidavit, and upon this petition and affidavit the rule of the 1st of May issued, which in substance directed that the record and processes and papers in the case should be sent up to this Court; that the proceedings in the matter should be stayed in the Magistrate's Court until further order of this Court; and that in the meanwhile the prisoner should be released upon certain security (which was specified in the rule) for his appearance in the Magistrate's Court when called upon. This rule, I believe, reached Mr. Kemble on the 12th of May. The Magistrate acted upon this rule so far as to admit the prisoner to bail upon recognizances conditioned for his appearance every day in the catcherry. At the same time the Magistrate wrote a letter to the District Superintendent of Police in these words:—"Sir,—Abdool Kadir has just been released by orders of the High Court on bail of Rs. 500 only. I think it extremely probable that he will try to escape and forfeit his bail, I therefore request that you will instruct the Police to watch his movements, and to report to me if he should be discovered leaving Purneah. He is bound to present himself to me every morning." Upon entering into the recognizances conditional in this manner, Abdool Kadir was released. The next day, the 15th, he presented himself at the catcherry in obedience to the terms of the security-bond, and Mr. Kemble as I understand, then directed that he should be taken into custody by his Nazir; the Nazir accordingly arrested him, detained him in his personal custody all day, and finally Mr. Kemble ordered that he should be taken to the civil jail and confined there. He professed to do this of his own authority as Collector under the provisions of Regulation XVIII of 1817. No evidence was then taken, nor I believe was any evidence taken in the presence of the prisoner at any time during the period of his incarceration in the civil jail, which continued for seven days. Not unnaturally the prisoner Abdool Kadir did not consider this behaviour of the Magistrate towards him as amounting to a complete carrying into effect of the orders of this Court given in the rule of the 12th of May, which, among other things, certainly directed that he should be released. So he presented a second petition, fortified by an affidavit, to this Court, and on the 19th of May a second rule was issued, calling upon Mr. Kemble to show cause why he did not carry out the order of this Court which was involved in the rule of the 12th of May. Before this second rule reached Mr. Kemble, he had, it seems, been informed by the Commissioner that the imprisonment of Abdool Kadir in the civil jail was altogether illegal, because the Regulation under which he professed to act had been repealed, and he was instructed by the Commissioner to lay a complaint in his own person against Abdool Kadir before the Magistrate, and to proceed in the regular way for the prosecution of that complaint. He therefore released the prisoner from the

civil jail on the evening of the 21st of May. On the 22nd he made a complaint on oath before the Joint Magistrate, Mr. Wyer, upon the footing of which Mr. Wyer issued a warrant of arrest, and Abdool Kadir was the same day again arrested upon the charges which were supposed to be embodied in this last mentioned complaint of Mr. Kemble. Upon his arrest a remand order was made out, by which he was committed to hajut to appear again before the Magistrate on the 30th of May, but it has not been shown to us that there was any evidence, and I believe I may take it that there was none upon which this order of remand to prison was made out. The prisoner then preferred a third petition to this Court representing the facts, which I have just mentioned, by affidavit, and a third rule was issued to Mr. Kemble on the 28th of May requiring him to send up the record of this second case, as well as the first, and to release the prisoner upon bail of himself Rs. 1,000, and two sureties of Rs. 500 each. In the meanwhile Mr. Kemble had made a second deposition before Mr. Wyer, and not in the presence of the prisoner, the purpose of which it is not easy to apprehend unless it was to make the original complaint upon which the prisoner had been already arrested, namely, on the 22nd May, more clear and more complete than it was before. Afterwards, again Mr. Kemble corrected both these depositions by what I may term a letter of appendix written to Mr. Wyer, and I believe that that letter has been placed upon the record by Mr. Wyer. Thus it has come about that the three rules which I first mentioned have been issued by this Court to Mr. Kemble, and are now before us for adjudication.

I will now return to the matter of the first rule. The learned Legal Remembrancer objects that the rule was issued by this Court without jurisdiction. He has put his objections very clearly in a detailed form, but I think I may group them somewhat and say that they substantially amount to, 1st, an objection that this Court has no jurisdiction to revise the proceedings of a Magistrate while they are in an interlocutory state; 2nd, that it has no jurisdiction to suspend such proceedings either at all, or at any rate without having the record before it; and, 3rd, that it has no jurisdiction in such a case to order bail to be taken, because the sessions Court has exclusive jurisdiction in that matter by virtue of s. 390 of the Criminal Procedure Code, and also because, in this particular case, circumstances justifying the release of the prisoner on bail did not exist, the offence with which he is charged being according to his own admission a non-bailable offence, and the conditions of s. 398 not being satisfied. Now it appears to me that s. 297 of the Criminal Procedure Code furnishes an answer to all these objections. The first clause of that section is as follows:—"If in any case either called for by itself, or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit." If that clause stood alone, clearly it would exhibit no limitation whatever in regard to the stage of judicial proceeding in

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which power is given to the Court to call up and revise these proceedings. The learned Legal Remembrancer argues however that the remaining clauses of that section, inasmuch as they are all directed to cases where there is a record, and where a final order, or an order which in some sense may be taken as a final order, has been passed, must be construed by implication to put a limitation of the kind which he contends for, upon the general words of the first clause. It seems to me that we should be wrong in coming to a construction of this sort, even looking upon the words of s. 297 alone, but when further we have regard to s. 64, which gives this Court the power whenever it appears to it that its order will promote the ends of justice and so on, to "direct the transfer of any particular criminal case, or appeal, or class of cases or appeals, from a Criminal Court subordinate to its authority, or to any other such Criminal Court of equal or superior jurisdiction, or may order the any offence shall be enquired into or tried in any district or division of a district other than that in which the offence has been committed, or that it shall be tried before itself," it is quite clear, I think, that the Court must have power to take cognizance of and revise proceedings before a Magistrate while they are still in the interlocutory state of pending investigation; otherwise there would be no reason why the Legislature should in this way give the Court express power to remove a case from one tribunal to another for the purpose of carrying on or continuing the investigation of it. I believe that the objection of the learned Legal Remembrancer on this point is made now for the first time, and at any rate the Court has, since the date when the new Criminal Procedure Code came into force, been, almost daily I may say, acting upon the general power of revision which hitherto has been supposed to be conveyed by this first clause. And if it has power by this clause, as it seems to me clear that it has, to call up to itself proceedings while they are in the condition of the preliminary stage of investigation for the purpose of correction and of giving proper directions for the conduct of the investigation, it must be incidental to that power that the Court should be able to suspend the proceedings, for it would be a manifest absurdity to my mind that the Court should be empowered by the Legislature to call up the record and the proceedings in a case for the purpose of looking at them, revising them correcting material errors, and putting them upon a proper footing of investigation, but yet that the Court should have no power to stay the proceedings of the subordinate Court which require to be set right. It is no doubt a very forcible objection on the part of the learned Legal Remembrancer that a step of this kind should not be taken by this Court without inspection of the record, and I readily concede this much to him, namely, that the Court ought not in any, except extreme cases, to interfere with the Magistrate's proceedings until it has the record before it. But I entirely deny that it has not the power to do so. If the Court were altogether unable to take such a step without having the record before it, the non-existence or non-production of a record would really effect a nullification of this Court's powers of revision in some cases which I could mention, and which by

their nature would be cases in which it was most necessary that this power should be exercised. In this very case, which is now under our consideration, before the day when Sreenath Banerjee was examined as a witness (1), there was nothing which could be called a record, and if the Magistrate chose to allow that state of things to go on and to keep the prisoner in custody, without, in fact taking any proceeding whatever, the result would be that, while the unfortunate prisoner might be illegally detained in jail for months, there would be no material in the shape of a record to be put before the Court upon which its action could be invoked. And yet obviously such a case as that would be one which would more require the intervention of this Court for the purpose of furthering the ends of justice than almost any other which could be instanced.

In truth, the absence of anything to record might afford the strongest possible ground for the interposition of this Court. But it further seems to me that the words of s. 297 entirely dispose of this question: "By them the Court is expressly empowered to pass such judgment, sentence, or order as it thinks fit in any case called for by itself" (i. e., where the record is sent for), "or which comes to its knowledge," and this last must I apprehend be any case the facts of which are brought to the knowledge of the Court in any sufficient manner, whether by the record or otherwise. It is however I need hardly say a rule of the Court not to suspend proceedings, and not to issue final orders to a subordinate Court, until it has the facts manifested to it in the most sure and certain shape, namely, the shape which the record itself affords, if possible; and nothing is more common when the summary interposition of this Court is invoked, than for this Court in the first instance to say we are only at this stage sent for the record, and when the record comes before us we shall see how the facts stand. But as I remarked during the course of the argument, the present case seemed to us a very exceptional one. We had facts before us positively sworn to, with regard to which it was not likely that perjury would be committed, and if these facts were accurately stated, they were such as rendered it incumbent upon us at once without delay to afford the petitioner the relief which he asked. It turns out that these facts were perfectly accurate, and I will take the opportunity here to say that the representation of facts which has been made to this Court on the three different occasions by Abdool Kadir Khan, in his several petitions and in the affidavits made on his behalf, have proved in our judgment to be throughout most fair, most candid, and most accurate; and I think at any rate, in the final disposal of these rules, he ought to have such benefit as he can properly derive from the truthful attitude which he has taken up in this matter. I don't think it is necessary for me to add further reasons why, if we have the power to bring up these proceedings, we must also have the power to suspend action in the Court below pending our enquiry. We now come to the third objection of the Legal Remembrancer to the effect that the order directing the Magistrate to admit Abdool Kadir to bail was made without jurisdiction. I

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(1) This was the witness examined on the 8th of May.

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find the answer to that objection in the same clause of s. 297 which I have already referred to. This Court is empowered by that clause to pass such judgment, sentence, or order thereon as it thinks fit," and it must in any case at least be fit and proper that this Court should give the Magistrate such directions as to his action as will lead him to do that which he ought to have done without the directions of the Court. Now, unquestionably at the time when the order to admit to bail was sent down by this Court, although it is said the offence of which Abdool Kadir was accused was a non-bailable one, the Magistrate had power to remand the prisoner, and during the period of remand to admit him to bail; in fact, as matters were represented to us, and as they now stand unimpeached, it was his duty under s. 389 to have admitted the prisoner to bail at the time when the prisoner applied to be admitted to bail. When it is said that the jurisdiction which is given to the Sessions Court by s. 390 in such a case as this to admit the prisoner to bail has the effect of excluding the power of the High Court, it seems to me that some misapprehension at any rate with regard to the two cases must exist. The case can only be brought before the Sessions Judge for bail upon the footing upon which it stood before the Magistrate, and although, as it happened in this particular instance, the facts are such as rendered it the duty of the Magistrate to admit the prisoner to bail, and therefore such as would make it the duty also of the Sessions Judge on appeal to direct that he should be admitted to bail, yet generally the case before the Magistrate as regards the question of bail, and the case in this Court, may materially differ. When the case has been brought up to this Court under the powers given by s. 297, and the day for further investigation and inquiry in the Court below has thereby necessarily been postponed for a considerable period, an additional element, a further ingredient, has been added to the case which would not have been in it had it been taken in the ordinary course in the Sessions Court; for it must be, as it seems to me, a most important matter for consideration in regard to the propriety of admitting the prisoner to bail, that this Court has found it necessary to postpone the day of further enquiry, and thereby considerably enlarge the period of the prisoner's intermediate imprisonment if he is to be detained in prison in the meanwhile; this I repeat is a most important element to be considered when the propriety of releasing upon bail is in question, and the addition of it may serve to turn the scale in the prisoner's favor, when this Court is called upon to determine what order is fit and proper to be passed under s. 297. On the whole then, it seems to me that the objections which the learned Legal Remembrancer made to the rule of the 12th of May fail him. I think that the rule is good and valid, and that it was the duty of the Magistrate to comply with it. It is virtually admitted in the facts that he did not comply with it, for he certainly did not release Abdool Kadir. It seems to me impossible to say that the admitting him to bail upon recognizances conditioned in the way in which the recognizances in this case were conditioned is the same thing as releasing the prisoner.

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I understood the learned Legal Remembrancer in his arguments of the day before yesterday to appeal to s. 391 as an excuse for the conduct of the Magistrate, and to urge that that section did afford a ground for a possible misapprehension on Mr. Kemble's part as to the intentions and orders of this Court involved in the directions to release on bail; and this I take it, is pretty nearly as much as admitting that the Magistrate did not carry out the order of the Court as they were intended to be carried out. I do not think I need dwell upon the terms of s. 391 because it seems to me that, if any one reads that section with an intelligent attention, he will see that the meaning of it is, not that a man when enlarged should be given a qualified or abridge liberty, but that it should be competent to the Court to make the recognizances extend to ensuring his attendance at more than one stated time or contingency to meet the purposes for which it was necessary that he should be bound to attend the Court, as, for instance, from day to day during the investigation or trial. The learned Legal Remembrancer also very forcibly put before us that there could be no intention on the part of any subordinate officer to disregard the orders of this Court, because he had an overpowering incentive to do his duty in the certainty which he must perceive of the action which would be taken by the executive Government in the event of his not doing it. If such motives as those for right action are to be referred to, I would also say that this Court has the power of vindicating its own authority whenever that authority is intentionally disregarded, and if it sometimes becomes necessary or expedient so to do when private persons are the offenders such a course would be still more necessary and expedient when judicial officers subordinate to it deliberately disobey its orders. If such a case should ever occur as I trust and believe it will not, it seems to me that it would constitute such a public scandal upon our administration of justice here as would demand the immediate intervention of this Court of its own authority, and I doubt not that such intervention would be effected. But we entirely accept the learned Legal Remembrancer's assurances that Mr. Kemble in this case had no intention whatever of disobeying the orders of this Court, or of doing any act of disrespect towards this Court. It is, I think, unfortunate that he was, if I may use the expression, not so entirely and thoroughly loyal towards superior authority in the first instance as he might have been; because it is clear that had the case to which the rule of the 12th of May was directed been sent up to this Court, and Abdul Kadir released on bail without delay, the further complication of the matter would have been avoided, and the Subordinate Court would have been set right most easily without that inconvenience, even to Mr. Kemble himself, which the course adopted by him has certainly brought about.

The third rule in some sense disposes of itself, and we have now before us both the record of the first case and the record of the second case preferred by Mr. Kemble against Abdul Kadir Khan. The last question then for us to consider is what is to be done in the matter of these two cases. The

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petitioner has asked that we should transfer the further investigation of them to some other Court, and I feel myself most reluctantly forced to say that, in review of the events which have occurred, I think both Mr. Kemble and Mr. Wyer, although, as I have already said, I acquit them altogether of any intention other than the intention to do their duty towards this Court and as public officers, have nevertheless come to be placed in a false position. As I remarked at the outset, the action which was taken by Mr. Kemble in the beginning was the action of a prosecutor. Had he openly prosecuted the case which he set up against Abdul Kadir before an independent Magistrate, I doubt not that everything would have gone well. As it was, he made some show of handing the matter over to another officer, but he did not do so in reality. I have already commented upon his letter of the 30th of December from himself to himself. On the 28th of April he directs the Joint Magistrate to issue a warrant of arrest, and the Joint Magistrate does so, not in the exercise on his own part of an independent judicial discretion, but because he is asked to do so by the Magistrate of the district upon the footing of a letter which that Magistrate wrote to him, or brought to his notice. The prisoner upon being arrested is not even then brought up before the Magistrate who issued the warrant of arrest, as he ought to have been in due course of law. Nothing I think can be clearer now than that the purpose of a warrant of arrest has been fulfilled when the prisoner is brought before the Magistrate who issued that warrant, or any other Magistrate qualified to act for him; and further that it is the duty of the person who receives the warrant, and is charged with its execution, to bring the prisoner before the Magistrate without any unnecessary delay. The warrant of arrest is issued, in the ordinary course, either upon information laid by a third person before a Magistrate, or by the Magistrate of his own authority under s. 142 of the Code; but still when the prisoner is once arrested under it, the remaining course of proceeding which is to be pursued is the same in both cases; the prisoner should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody, or to remand him to prison without some reason made manifest to him either in the shape of sworn testimony given before him, or in some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison, there to be detained for a limited period before further examination, a period which is never in any case to exceed 15 days. Nothing of the kind occurred here, and it is most important I think to bear this in mind, because it goes to show that Mr. Wyer has not, almost from the beginning to the end, or at any rate for the greater portion of the case, given himself even an opportunity of exercising a judicial discretion upon matters of evidence before him. In making the first order of commitment to *hajut*, i.e., the first remand order, he acted on the memorandum of the Court-Inspector only, and in making the more formal remand order, which he issued on the 1st of May, he acted solely upon the request of Mr. Kemble, without any other reason manifested to him

in any form whatever, as I understand, why he should so exercise his judicial discretion. The consequence was that, from the 28th of April until the 8th of May, i.e., for ten days, Abdool Kadir was detained in custody without any legal cause simply at the instance of Mr. Kemble as it seems to my judgment. On the 8th of May the evidence of Sreenath Banerjee was taken. I will assume that that evidence was sufficient to furnish a ground for the further detention of the prisoner. In order that it should do so, it ought to have a tendency to show that the prisoner had committed some specified offence, and that further evidence would be likely to be obtained by a remand. I am not sure that there is even now after Sreenath Banerjee has given his evidence any sufficient material on the record to indicate what offence has been committed by any one, or further to indicate that Abdool Kadir is the person who committed it. The warrant of arrest was issued clearly in ignorance of any evidence bearing on the point, for it did not in any degree specify the offence of which Abdool Kadir was accused, it merely stated generally that he was to be arrested for an offence under s. 409; a vague statement of this kind, I may remark, is by no means a compliance with the provisions of the Criminal Procedure Code, which, for obvious reasons, directs that the offence shall be specified in the warrant. What information could possibly be conveyed to an ignorant prisoner by such a statement? I will not pay Mr. Wyer the bad compliment of supposing that he ever thought it was sufficient. The fact was that he could not make it more specific, and this fact affords the key to the whole of the irregularities committed. After the 14th Abdool Kadir's imprisonment for seven days, which was effected by Mr. Kemble, was clearly without jurisdiction, and without legal cause. Mr. Kemble was still not in a position to make a definite accusation against Abdool Kadir, and nevertheless was still struggling by any means regular or irregular to keep him in his grasp. And again, when we come to the second case preferred by Mr. Kemble upon alleged new grounds against Abdool Kadir, we find that, although the original warrant of arrest was probably founded upon sufficient sworn information, yet the subsequent remand from the 22nd until the 30th was an order again made by Mr. Wyer without any reasonable ground, or indeed any cause whatever. Thus it appears to my view very plainly that Mr. Kemble has been acting in this matter from first to last, in the first case as well as the second (calling them two cases, though they really are one), as the prosecutor of Abdool Kadir Khan. It seems to me further that, in neither the one case, nor in the other, is he yet in a position to specify in any degree the particular charge or charges upon which he is prepared to accuse Abdool Kadir, and in neither case is he yet prepared to offer evidence upon which he can ground a charge against him. It is probably pretty certain that there were very large defalcations in the Purneah Collectorate treasury in 1870 and 1871; and no doubt, Mr. Kemble believes that Abdool Kadir was the person who embezzled a good deal of the money; but he cannot yet make any particular accusation against

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him : and is uncertain that evidence of his guilt will ever be forthcoming. In this situation Mr. Kemble has, as it seems to me most anxiously, from the time when he came to know of the judgment of acquittal passed by this Court, endeavoured to hold Abdool Kadir as it were under his hand, while he is making those enquiries and investigations which he believes will enable him some day to make a definite charge, and to support it with evidence against Abdool Kadir. He has used the authority of Mr. Wyer as Joint Magistrate in aid of his purpose to keep Abdool Kadir within arm's reach in the manner I have described. It further seems to me that, during all those proceedings, Mr. Wyer has lent himself to Mr. Kemble's purposes, and has refrained from exercising a real judicial discretion of his own. He has arrested Abdool Kadir at Mr. Kemble's dictation, and detained him in prison without legal cause at Mr. Kemble's request, and he did this last in the so-called second case when he must have had full notice of the high-handed character of Mr. Kemble's conduct in confining Abdool Kadir for a week in the civil prison. It is with this view that I say it appears to me that both Mr. Kemble and Mr. Wyer have come to be in a false position in this matter, and that I think it will not be right or fair either to themselves, or to the prisoner, that the further inquiry into and investigation of these two cases should be carried on judicially by either of these two gentlemen.

I believe I may say that we are agreed upon taking the course in this case which was taken in the precedent afforded by the Banceorah case (1). There is no doubt, for the reasons which were put forward by the learned Legal Remembrancer the day before yesterday, that it would be exceedingly inconvenient, and probably would cause great expense and delay if this case were sent to another district for inquiry and trial. We desire to avoid this consequence if possible; and accordingly we think that it will be best that our views, with regard to the necessity of removing these cases from the cognizance of Mr. Wyer and Mr. Kemble, should be communicated to the Government of Bengal, in the hope that the Government may depute a qualified officer to Purneah to entertain these cases in the place of either of those gentlemen. And upon being certified that such deputation has been made, we will make an order for the transfer of the cases to the officer so appointed for due inquiry and investigation. We think further that any other case which Mr. Kemble may wish to institute against Abdool Kadir in his capacity of Collector as prosecutor, arising out of these Collectorate defalcations, should be also preferred before this official, and be proceeded with of course promptly as possible. Should the Government of Bengal not see good reason to make an appointment of this kind, we shall feel obliged to transfer the case to another district. We therefore make no order at present, but simply adjourn the case for one month. The accused will remain on the present bail until called upon to answer to the charges by the local Court.

KEMP, J.—I entirely concur in the judgment which has just been delivered by Phear, J. It has occurred to me to have to sit for a short time with that learned Judge during the illness of Ainslie, J., and during that period two cases which had been tried by two Sessions Judges of Zillah Purneah came before us on appeal. In both those cases the accused Abdool Kadir Khan was concerned. In one of those cases Phear, J., passed a somewhat severe censure upon the conduct of the Sessions Judge Mr. Lockwood, and I entirely concurred in that censure, although I did so with great regret.

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I am of opinion, an opinion deliberately arrived at, that the whole of the proceedings in this case, so far as they have gone, are most discretable to the judicial authorities of Zillah Purneah. It appears that in 1870, 1871, certain defalcations took place in the Collectorate of Zillah Purneah. I understand that the Government have reconqued themselves by directing the then Collector Mr. Worgan to make good the sums embezzled by deductions from his salary. Subsequently it was necessary to cast about for a victim upon whom to saddle these defalcations, and various charges, the subjects of the former trials and of the proceedings now before us, were laid against the accused Abdool Kadir Khan. This person was at the time of the defalcations the head clerk of the Collectorate. Ordinarily speaking, and I speak from my own experience, which is not a limited one in Collectorate matters, a person in such a capacity, namely, that of head clerk, would not be entrusted with any moneys belonging to Government; and, therefore, it must have been under very exceptional circumstances that Abdool Kadir Khan could ever have had anything to do with money matters in the Collectorate. We have been told that Abdool Kadir was a great favorite of the late Collector Mr. Worgan, and although during that gentleman's presence at the station of Purneah, before he went to England on furlough, proceedings were taken against Abdool Kadir before Mr. Weeks, who was then the Joint Magistrate of Purneah, proceedings taken some time after the defalcations were discovered, and as already observed, at a time when Mr. Worgan was present at the station, who having himself been called upon to make good the amount of these defalcations, had a personal interest in fixing the responsibility upon some body else, even then and upon picked charges, the final result is that the accused has been acquitted. After the double acquittal by this Court in the trials above alluded to, the first being conducted by Mr. Lockwood, and the second by Mr. Ward, further proceedings have been taken which have led to the three rules which are now before the Court.

It is quite unnecessary for me to add anything, but a few words of entire concurrence with what has fallen from Phear, J., with reference to the objections taken by the Legal Remembrancer as to the jurisdiction of this Court.

It appears to me clear that Mr. Kemble the Magistrate has disobeyed the orders of this Court; but I am happy to find that my learned colleague is of opinion that there has been no want of *bona fides* on the part of

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Mr. Kemble in this matter. I must say, speaking for myself, that Mr. Kemble's conduct, more particularly with reference to the double capacity in which he has acted in this matter, endeavouring to evade compliance with the orders of this Court as Magistrate, by turning himself for the nonce into a Collector, and then acting under an old Regulation which has been repealed is not altogether consistent with an earnest intention to carry out our orders. I do not wish however to press this matter further, nor in any way to dissent from the judgment which has just been delivered by my learned colleague.

In the matter of the transfer of the case to another Court, I admit that this is a step which this Court ought not to take except under extraordinary, circumstances and on very clear and satisfactory grounds. I think it is undoubtedly a slur upon an official of any grade when proceedings which have been instituted before him are removed from his Court to another Court; but if the interests of justice require that such a step should be taken, it is the duty of this Court to do so without any reference to what the feelings of an official may be on receiving the orders of this Court directing him to transfer the case to another officer. Such proceedings of course carry with them an indication that this Court can have no longer any confidence in that officer in the matter of his further proceeding in the case under consideration, but as I have already said, the interests of justice must be first looked to. In this case I do not think it right that Abdool Kadir, after what has passed, and looking to the former proceedings which have taken place in this case and to the attitude of defiance in which the local authorities have placed themselves in carrying out the orders of this Court, or rather in not carrying out its orders, should be tried either by Mr. Kemble or by Mr. Wyer. I do not think, and I say so advisedly, that Abdool Kadir would obtain a trial entirely free from bias before either of those officers. It is therefore with considerable reluctance and regret that I am obliged to concur in the transfer of this case, as also in the censure which has been passed upon the local officers by Phear, J.

Before Mr. Justice Mapherson.

S. M. TARRAMONEY DABEE v. HURRO MOHUN CHATTERJEE AND OTHERS.

1873
May. 8

Suit in Forma Pauperis—Act VIII of 1859, ss. 304—306.

This was a suit in *forma pauperis*. The petition had been admitted, and the usual order made under s. 305, and the case now came on for hearing under s. 306.

Mr. Branson for the defendant proposed to show by examination of the plaintiff that, on the facts stated in the petition, there was no cause of action.

Mr. Marsden for the plaintiff objected that in suits in *forma pauperis* no question except the pauperism of the petitioner could, under s. 306, be gone into—*Shiponnessa Bibee v. Kamina Bibee* (1) and *Dipsanji Jilsanji v. Fattesanji Jasvatsanji* (2). The petition had been presented in the usual way to the Court, and it must have been decided that there was a cause of action, under s. 304, otherwise the notice provided for in s. 305 would not have been allowed to issue. The ss. 305, 306, 307 are to be taken together. S. 306 refers to the same kind of evidence as is to be taken under s. 305, i.e., evidence as to the property with a view to judging of the pauperism. So also s. 307.

Mr. Branson.—There are cases later than those cited which are contrary to them. In *Bibee Muzerum v. Sims* (3), which was a suit in *forma pauperis* against an attorney for alleged negligence in allowing a decree to pass against the plaintiff, the defendant, when the case came on for hearing under s. 306, was allowed to show that the plaintiff had known of, and consented to, the decree as it was made. Where, on the day fixed for hearing evidence on the question of pauperism, the defendant brings to the notice of the Court any ground on which the Court would have been bound to refuse to admit the petition, it is in the discretion of the Court to admit or refuse to admit evidence of such ground—*In the matter of the Petition of Gunga Dass Adhikarree* (4).

(1) 2 I. J., N. S., 121.

(2) 5 Bom. H. C., A. C., 59.

(3) Unreported.

(4) Before Mr. Justice L. S. Jackson
and Mr. Justice Mitter.

The 1st September 1870.

IN THE MATTER OF THE PETITION OF
GUNGA DASS ADHIKARREE.

*Suit in Forma Pauperis—Act VIII of 1859,
ss. 304—306—24 & 25 Vict., c. 104, s. 15,*

Bahoo Khetter Nath Bose for the petitioner.

The following judgments were delivered :—

JACKSON, J.—This is an application for the purpose of obtaining the intervention of this Court, under s. 15 of the High Court's Act, to set aside an order passed by the Subordinate Judge of Midnapore, purporting to have been made under the provisions of Chapter V of the Code of Civil Procedure.

The application was presented by the petitioner in person, but at the request of the Court, Baboo Khetternath Bose has been good enough to argue it for him, and has done to us the service of bringing to our notice several decisions on the point.

The suit which the petitioner proposed to

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MACPHERSON, J., said he would allow the plaintiff to be examined with a view to show that, on her own evidence, she had no cause of action.

bring was a suit to establish his right to be a joint *sebit* of a certain religious establishment under a will of the late. Mohunt Sitaram Doss.

It appears that the Subordinate Judge, after hearing the petitioner, gave notice under s. 305 to the opposite party, and on the opposite party appearing, proceeded to consider the interpretation of the will on which the petitioner relied, and finding that a construction had been put upon the will by a previous decision of the High Court, he considered that the petitioner had no right to institute a suit in *forma pauperis*, and on that ground has rejected his petition: and the ground on which our intervention is asked for is that, in coming to this decision, the Court below has gone beyond the limits prescribed for it, under s. 304 of the Code of Civil Procedure, and has, therefore, made an order beyond its competency to make.

We have been referred to two cases—*In the Matter of Ramchunder Bromocharee (a)* and *Bhagbut Doss v. Buloram Doss (b)*—which are expressly upon this point, and a third case, *Golam Guffoor v. Ekram Hossein Chowdhry (c)*, has been referred to which is not I think precisely to the point, although it has a certain bearing on the case; there is also a case of *Shiponneasa Bibee v. Kamina Bibee (d)*. In the first case which I have mentioned, the learned Judges held that the only points for consideration by the Court in the 5th chapter of the Code were whether the defendant or matter of the suit is within the jurisdiction of the Court, or whether the claim is barred by the statute of limitation, or whether the allegations of the petitioner constitute a reasonable ground of action. I observe that by apparently an oversight in that part of the judgment, the words used are—"constitute a cause of action," and in the case of *Shiponneasa Bibee v. Kamina Bibee (d)*, Markby, J., held upon the hearing that, under the 305th and 306th sections, the only objections which the Court could hear were those advanced, together

with evidence upon the point, upon the question of pauperism.

Now, if the form in which this matter came before us required it, I think we should be bound to refer this question for the decision of the Full Bench, because as at present advised, I do not entirely concur in the decision of those cases.

The sections relating to this subject must be read together. S. 304 in particular must be read with the section immediately preceding, *vis.*, s. 303. The first mentioned section provides that, "if the petition be in form and duly presented, the Court will proceed to examine the petitioner regarding the merits of the claim and the property of the petitioner." These must be taken in connection with the words occurring in a clause of s. 304, *viz.*, "that the allegations of the petitioner do not constitute a reasonable ground of action" which must, I think, be held to mean that the claim has no merits, that is to say, that the plaintiff would not probably succeed in his action. The grounds stated in s. 304 are, it seems to me, those which, if they appear, compel the Court at once to refuse to allow the petitioner to sue as a pauper, and take away the discretion of giving notice to the opposite party and fixing a day for hearing; but if the Court should not then see reason to refuse the application, the Court is at liberty to fix a day for hearing evidence to be adduced on either side upon the question of pauperism; and on the day so appointed, the Court is at liberty to consider any objections which may be made by the opposite party, examine any witnesses produced by either party, and either allow, or refuse to allow, the petitioner to sue as a pauper; and I apprehend that upon such further hearing, if the opposite party should bring to the notice of the Court any ground upon which the Court would have been bound under s. 304 to refuse to allow the petitioner to sue as a pauper, it would be the duty of the Court, at any rate it would be in the discretion of the Court, upon being so informed, to refuse leave. If this were not so, the Court would

(a) 8 Sev. Rep., 465.

(b) 3 W. R., Mis., 20.

(c) 10 W. R., 357.

(d) 2 I. J., N. S., 121.

The plaintiff was then examined, but her evidence did not show that she had no cause of action.

Mr. Branson proposed to show it by calling other witnesses, but MACPHERSON, J., refused to allow this (1).

Attorney for the plaintiff : Mr. Pearson.

Attorney for the defendant : Messrs. Beeby and Ritter.

be competent to allow a suit to be brought *in forma pauperis*, although it might be brought to the notice of the Court, on the appearing of the opposite party, that the cause of action on which the petitioner desired to sue had been already determined. The words "within the jurisdiction of the Court" in s. 304, I understand to mean within the local jurisdiction. The words are—"the defendant or matter of suit is not within the jurisdiction of the Court." I understand that to refer to local situation, and not to refer to the power of the Court to take cognizance of the matter. Many other instances might be pointed out in which the Court would be compelled to go on and entertain a suit which manifestly could not succeed, if it were snet out from considerations such matters as might be brought to its notice by the opposite party at the hearing under s. 305.

I have stated these reasons at some length, because I should not wish it to be supposed that I had refused to consider the cases which were referred to on this occasion ; but, in point of fact, it seems to me sufficient to say, for the purpose of disposing of this application, that in my judgment the Court below has not exceeded its jurisdiction, nor made an order which it was not competent to make in taking into consideration the construction of the will on which the plaintiff relied, even although it allowed its judgment to be guided by a previous decision of the High Court on the same point. Consequently there is no ground for our interfering under s. 15 of the Charter Act.

MITTER, J.—I am of the same opinion. I do not think that the Subordinate Judge

has exceeded his jurisdiction in this case, and I think he was competent to take into consideration the will upon which this suit was brought, for the purpose of determining whether the plaintiff had a valid ground of action or not.

Whether the enquiry under s. 306 is to be restricted to the question of pauperism or not is a point upon which I wish to express no opinion ; but it seems to me quite clear that the Subordinate Judge was fully competent to enquire into the true meaning of the will, in order to ascertain whether the plaintiff had a good cause of suit or not. Section 311 expressly takes away appeals from orders passed under Chapter V of the Code of Civil procedure, and if the order passed by the Subordinate Judge was passed with jurisdiction, I do not see how we can interfere with it under the provisions of the Charter Act.

Whether the construction put by the Subordinate Judge upon the will propounded by the plaintiff was correct or not, is not a matter which we can be called upon to decide upon this application.

(1) In the case of *Buggobutty Dossee v. Konnoylall Mitter* (a), September 4th, 1871, before Phear, J., Mr. Woodroffe and Mr. Marindin proposed to show on the examination of the plaintiff, a *suitor in forma pauperis*, that she had no cause of action on the facts appearing in her petition, and referred to *In the Matter of Gunga Dass Ahikae* (b), but Phear, J., refused to let any question be gone into except the question of pauperism.—*Reporter's note*.

(a) Unreported. (b) *Ante*, p. 23.

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Before Mr. Justice Macpherson.

KUSTOOR MULL AND ANOTHER v. JOOKEERAM AND OTHERS.

Service of Summons—Partner—Agent—Act VIII of 1859, s. 17 cl. 2.

1873
July 14.

THE defendants in the case carried on business in partnership in Calcutta, Service had been effected by leaving the summons with one of the defendants, not at the place of business in Calcutta, but in the mofussil at Furrackabad.

The suit was undefended.

Mr. Ingram, for the plaintiffs, submitted that service on one of several partners was sufficient service on the firm, and referred to *Ramchundra Bose v. Snead* (1). One of several partners is the agent of the other partners under s. 17, cl. 2 of Act VIII of 1859.

MACPHERSON, J.—There is a distinction between that case and the present. You have not served any of the defendants at their place of business in Calcutta. If the defendants who has been served had been at the time of service actually carrying on business in Calcutta for himself and the other defendants as partners, no doubt he might be deemed an agent for them under s. 17, cl. 2, and the service might be good. As it is, it is good only against the defendant served.

Attorney for the plaintiffs : Mr. Dignam.

Before Mr. Justice Pontifex

IN THE MATTER OF TARINEY CHURN GOHO, AN INSOLVENT.

Jurisdiction of Insolvent Court—Bona Fide Residence.

1873
July 15.

THE insolvent described himself in his schedule as residing at Cossipore, and as being a writer in the employ of Messrs. Cook & Co., horse-dealers in Calcutta. He now applied in person for an *ad interim* protection order.

There was no opposition; but the application was refused by PONTIFEX, J., who said :—To come within the act, the insolvent, not being a European British subject must either be a *bona fide* resident in Calcutta at the time he presents his petition, or a trader carrying on business in Calcutta. In this case the petitioner is neither the one nor the other, and therefore his application must be refused.

(1) 7 B. L. R., App., 58,

Before Mr. Justice Jackson and Mr. Justice Mitter.

**ROY LUCHMIPUT SINGH BAHADOOR (DEFENDANT) v. THE
SECRETARY OF STATE FOR INDIA (PLAINTIFF).***

1873
May 1.

*Act VIII of 1859, ss. 92, 246—Injunction—Attachment in Execution of Decree—
Procedure.*

THIS was an appeal against an order of the Officiating Subordinate Judge of Moorsshedabad granting an injunction under s. 92 of the Code of Civil Procedure for the purpose of stopping the execution-proceedings in respect of certain immoveable property which had been attached with a view to sale in execution of a decree obtained by Roy Luchmiput Singh Bahadoor against the Nawab Nazim of Moorsshedabad. Upon the attachment of the property in question, a claim to it had been put forward by the Secretary of State in Council as entitled in succession to the East India Company. That claim was refused, and as provided by s. 246, the Secretary of State immediately brought a suit against Roy Luchmiput Singh to establish his right, and it was in this suit that the order now complained of was made. The injunction was one restraining the defendant, Roy Luchmiput Singh, from proceeding to execute his decree against the property which was the subject of dispute. The Nawab Nazim of Moorsshedabad was subsequently made a party to the suit under s. 73, Act VIII of 1859.

The defendant, Roy Luchmiput Singh, appealed to the High Court. The grounds of appeal were, that the order granting the injunction was illegal since neither attachment nor sale could affect the interest of the plaintiff if a decree were ultimately obtained by the Government, as the effect of such a decree would be to restore to the plaintiff the attached property in whomsoever's hands it might be; and that as no damages could accrue to the plaintiff within the meaning of s. 92, Act VIII of 1859, even if a sale of the attached property should take place, there were no legal grounds for granting the injunction.

Mr R. T. Allan and Baboos Sreenath Doss and Rash Behary Ghose for the appellants.

The Advocates-General (offg.) (Mr. Paul) and The Standing Counsel (Mr. Kennedy) for the respondent.

The judgment of the Court was delivered by

JACKSON, J. (who, after stating the facts as above, continued):—It appears to me that regard being had to the terms of s. 92, and to the place

* Miscellaneous Regular Appeal, No. 68 of 1873, from an order of the Officiating Subordinate Judge of Zillah Moorsshedabad, dated the 24th February 1873.

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which that section occupies in the Code of Civil Procedure, its provisions are not applicable to a case like the present, and do not justify the issue of this injunction. The suit, although the Nawab Nazim has since been made a party under s. 73, was against Roy Luchmiput Singh, and the injunction was specifically directed against him. It cannot, I think, be said, that the property in dispute was in danger of being wasted, damaged or alienated by this defendant, nor as the property been, or is it at present, in any sense in his possession. That which the plaintiff apprehended, and which was in fact likely to occur, was that the defendant, should, in executing his own decree, set the Court in motion, and cause the right, title, and interest of the Nawab Nazim to be sold and conveyed to some other person. If such sale had taken place, and if the property had gone into the hands of some person who was likely to waste, damage or alienate it, such an injunction might have been properly and reasonably applied for. The course which has been taken in the present instance appears to me too nearly to resemble the action of the Courts of Equity upon proceedings at common law in England to be applicable to proceedings of our mofussil Courts, and I think therefore that the plaintiff entirely misconceived the course which he ought to have taken in applying for this injunction. This, however, it appears to me, is only a matter of procedure. The parties before us in the present case are the very parties who were before the Court in the execution claim and proceeding and as in my opinion upon the state of facts disclosed in this case, it would not have been proper for the Court to proceed to sell the property in dispute I do not think that that which is in itself right and reasonable should be prejudiced because the parties have taken a technically erroneous course. I cannot doubt that, if the Secretary of State had presented a further petition in Court, in the execution case of Roy Luchmiput Singh, representing that upon the rejection of his claim, he has now brought a suit to establish his right, and praying that the sale should be postponed, the property continuing under attachment, the Court would and ought to have complied with his application. It appears to me, therefore, that we should direct the present injunction to be dissolved, but at the same time we should order that the application should be dealt with as if it were made in the execution proceedings, and that an order should be entered on those proceedings staying the sale pending the suit which has now been commenced, provided always that it should be competent to the decree-holder in case of any undue delay in prosecuting the suit to make a further application to the Court for an immediate sale. The order of the Court below being varied in this way the case appears to me to be one in which we should make no order as to costs.

Before Mr. Justice Phear and Mr. Justice Ainslie.

SURUB NARAIN CHOWDHRY AND OTHERS (PLAINTIFFS) v. SHEW GOBIND PANDEY AND ANOTHER (DEFENDANTS).*

18:3
May 12.

Hindu Law—Mitakshara—Sale by Father—Suit by Son to set aside Alienation by Father—Refund of Purchase-money.

Baboo Mohesh Chunder Chowdhry for the appellants.

Baboos Romesh Chunder Mitter and Nil Madhub Bose for the respondents.

THE facts are sufficiently stated in the judgment of the Court, which was delivered by

PHEAR, J.—In this case the plaintiffs sue to set aside a sale effected, as I understand, by their father, of the joint family property, on the ground that he did it without the consent of all the members of the joint family, and had no authority founded on necessity or otherwise to pass the title.

It appears that, since this sale by the father took place, ten years have elapsed; and in the meanwhile (as much as six years before the bringing of the suit), the purchaser from the father sold again to the principal defendants for valuable consideration. There is no suggestion that these defendants did not purchase this property *bona fide*.

The lower Appellate Court has dismissed the plaintiffs' suit, and the case now comes up before us on special appeal.

It seems to me that we are not, under the circumstances which I have detailed, strictly speaking, called upon to say whether or not the defendants have obtained a good title to the property which they have purchased. It is possible, however, that they have done so upon the ground which is pointed out by the lower Appellate Court, namely, the ground of necessity. For I need hardly say that, when a sale, effected by the representative of the joint family the *karta* or guardian, is impeached on the ground that it was not justified by necessity, it is only incumbent upon the defendants who purchased in the belief that there was such necessity to show that they had made all reasonable enquiries under the circumstances which attended the case, and had reasonably been led to the belief that there was such necessity. In the case before us the defendants purchased, as I may say, second-hand, five or six years after the property had been originally sold by the father, and during the whole of this time the present plaintiffs stood by quiescent, and did not in any way interrupt

* Special Appeal, No. 947 of 1872, from a decree of the Judge of Saran, dated the 14th March 1872, reversing a decree of the Subordinate Judge of that district, dated the 26th April 1871.

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or interfere with the enjoyment of the property by the father's vendee. That fact alone, it seems to me, ought to go a long way to satisfy a *bona fide* purchaser from that vendee that the original transaction had been a good and valid one. He cannot by the nature of the case have it in his power to make narrow enquires into the circumstances which led to the sale of the family property five years before the time at which he purchased, and a comparatively little enquiry, supported by the evidence of *bona fides* in his case, ought I think to be sufficient to afford a good defence to the man who stands in that position. But whether this be so or not, it is very clear to my mind that even if the plaintiffs are in strict law entitled to say to the defendants 'you have obtained no legal title to this property, it is family property which our father had no power to alienate, and we call upon you to deliver it back to the family,' yet they certainly cannot do that without offering at the same time to refund to the defendants the money with interest which they paid as consideration for their purchase. The Court could only grant a decree for the recovery of the property by the joint family upon those terms, because it would be intolerable that it should be in the power of the adult members of a joint family to stand by, to see the property sold to persons who *bona fide* gave money for it, to remain quiet in view of these facts for a period of ten years without in any way disputing the enjoyment of the property obtained under that alienation, and then that they should come into Court and be allowed to say 'although we have stood by for these ten years, we have not stood by for twelve years, and therefore we can claim to have the property given back to the family without reimbursing you a single pie.' It seems to me that it is a very plain matter of equity and justice that, if the plaintiffs under circumstances like these seek to recover back the family property which they have allowed for these years to remain out of the family, they can only do so under the condition of refunding to the purchasers the money which they paid for the purchase. But the plaintiffs have not offered to do so in this case, indeed they have no intention of doing it, as is apparent from what has already fallen from the plaintiffs' pleader in the course of his argument. We think we ought not to interfere with the decision of the lower Appellate Court, because it seems to us that, in view of the facts as they are found by both the Courts, it is a perfectly righteous and correct decision.

We dismiss the appeal with costs.

Before Mr. Justice Jackson and Mr. Justice Mitter.

**GUNGA GOBIND SEN (DEPENDANT) v. GOBIND CHUNDER DOSS
AND ANOTHER (PLAINTIFFS).***

*Beng. Act VIII of 1869, s. 29—Limitation—Suit for Arrears of Rent—Pro
Forma Defendants.*

1873
March 18.

This was a suit instituted under the provisions of Beng. Act VIII of 1869, on an *ijara kabuliat* dated 21st Jaishta 1265 (2nd April 1858), executed by the principal defendant, Gunga Gobind Sen, to recover the sum of Rs. 489-3-10, being the sum due to the plaintiffs in respect of their fourth share of the Zemindari Ramkanie, of which they were co-shares with the defendants, for the year 1271 to 1276 (1864 to 1869). It appeared that the co-sharers jointly borrowed Rs. 5,000 from the appellant on the *ijara* or usufructuary mortgage of their shares for fourteen years at a yearly rental of Rs. 2,292, on condition that the appellant should keep to himself annually Rs. 725 on account of interest of the loan, pay the Government revenue Rs. 1,343-0-7, and give the mortgagors, Rs. 223-6-5 for their subsistence. It was in respect of the last claim that the present suit was brought. The plaintiffs had previously brought their suit in the Revenue Court making their co-sharers who did not join him in the suit *pro forma* defendants. They instituted the present suit in the Civil Court on 27th February 1871. In the Courts below the defence was raised that a portion of the plaintiffs' claim was barred by the law of limitation, and that they were only entitled to recover for the three years previous to the institution of the suit. The Munsif referred to the case of *Prosonno Coomar Paul Chowdhry v. Mudden Mohun Paul Chowdhry* (1), and gave a decree for the whole amount claimed. On appeal

(1) *Before Mr. Justice L. S. Jackson and
Mr. Justice Glover.*

The judgment of the Court was delivered by

The 25th April 1870.

**PROSONNO COOMAR PAUL CHOW-
DHRY AND ANOTHER (DEPENDANTS) v.
MUDDEEN MOHUN PAUL CHOW-
DHRY AND OTHERS (PLAINTIFFS).†**

JACKSON, J.—It appears to me that it is not necessary to trouble the pleaders who appear for the respondents, because the appellants have made out no good or sufficient cause for impugning the judgment of the Court below.

Baboo Annoda Pershad Banerjee for the appellants.

There were three questions of law raised in this appeal; the first being that the Civil Court had no jurisdiction to entertain this suit, the real object of that suit being to recover from the defendants an arrear of rent, such a suit being, it was contended, cogni-

Baboo Onoocool Chunder Mookerjee and Mohiny Mohun Roy for the respondents.

* Special Appeals, Nos. 423 and 475 of 1872, from the decrees of Subordinate Judge of Tipperah, dated the 7th December 1871, affirming the decrees of the Munsif of that district, dated the 10th April 1871.

† Regular Appeal, No. 256 of 1870, from a decision of the second Subordinate Judge of the 24-Pergunnas, dated the 23rd September 1869.

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 DER Doss.

by the defendant Gunga Gobind Sen, the Judge held that the provisions of s. 16, cl. 1, Act XIV of 1859, applied to the case, and dismissed the appeal.

The defendant, Gunga Gobind Sen, appealed to the High Court.

Baboo *Doorga Mohun Doss* for the appellant.

Baboo *Bungsheedhur Sen* for the respondents.

Baboo *Doorga Mohan Doss* for the appellant contended that this was a suit for the recovery of money on a breach of a written contract, viz., the *ijara kabuliat*, which could have been registered under the provisions of Act XIX of 1843, and therefore the period of limitation was that provided by cl. 10, s. I, Act XIV of 1859, viz., three years from the time when the breach of contract in respect of which the suit is brought just took place, and that the lower Appellate Court was wrong in holding that there was no provision in Act XIV of 1859 for a suit like this, and in holding that, therefore, cl. 16, s. 1, was applicable. Even if cl. 10, s. 1, does not apply, the plaintiffs' claim is barred for the first three years sued for, as the period of limitation provided by s. 29, Beng. Act VIII of 1869, applies to the case.

Baboo *Bungsheedhur Sen* for the respondents contended that there being no special law of limitation by Act XIV of 1859 applicable to the case, it fell under cl. 16, s. 1 of that Act, and consequently the whole claim should be decreed, Act VIII of 1869 does not apply—*Prosonno Coomar Paul Chowdhry v. Mudden Mohan Paul Chowdhry* (1).

zable in the Revenue Court, and that Court alone. It appears that a suit for that sole object was commenced in the Revenue Court, and by the final judgment of the Full Bench (a) of this Court, it was decided that it was not cognizable by the Court of the Collector upon the ground that there was no actual contract between the plaintiffs and defendants, and that the liability of the defendants would arise out of equitable considerations which the Collector's Court was not competent to determine. The present suit, therefore, is not merely a suit to recover arrears of rent, but to determine the liability of the defendants arising out of matters not within the cognizance of the Revenue Court, so that the arrear of rent may be recovered upon such liability being made out. I think it clear, therefore, that the Civil Court (as indeed, a distinct expression of opinion to that effect was thrown out in the judgment of the Full Bench) had jurisdiction.

Secondly.—It was stated that this claim

was barred by limitation, inasmuch as the suit being for arrears of rent for 1270 and 1271 (1863 and 1864), and being commenced on the 7th of Magh 1275 (19th January 1869), was brought more than three years after the rent became due, and therefore, under s. 32, Act X of 1859, was after time. It appears to me that the period of limitation specified in Act X of 1859 has reference exclusively to suits brought and determined under that Act. This is not a suit tried under Act X of 1859, but under the general jurisdiction of the Civil Court.

But even if the plaintiffs were limited by the period of three years, it appears to me that they are amply within that period, because they are entitled, under s. 14, Act XIV of 1859, to a deduction of the period during which they were *bona fide* prosecuting their claim in the Revenue Court. This is the third point of law which was raised, and I think it must be decided in favor of the respondents.

{1). *Ante*, p. 31.

(a) *Prosonno Coomar Paul Chowdhry v. Koylash Chunder Paul Chowdhry*, Case 239 of 1866; 23rd September 1867.

The judgment of the Court was delivered by

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JACKSON, J.—The plaintiffs in this case sued the defendants, who are *ijaradars* of the property in which they were joint owners or co-sharers, for arrears of rent extending over the period of six years. They first brought their suit in the Revenue Court, and inasmuch as the co-sharers had not joined them in that suit, they made them co-defendants. It does not appear that the plaintiffs sought any relief against these co-defendants, but by reason of their being parties to the suit, it was held by a Division Bench of this Court that the suit so constituted could not proceed in the Revenue Court. The plaintiffs therefore, have now instituted the suit in the Civil Court. It was brought in February 1871, therefore some time after the Beng. Act. VIII of 1869 came into operation.

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DER DOSS.

The defendants objected that, under the law of limitation applicable to the case, no more than three years' rent could be recovered, but the Subordinate Judge has held, affirming the decision of the Munsif, that cl. 16, s. 1, Act XIV of 1859, applied to the case.

It appears to me that although the co-sharers were made *pro forma* defendants in the case, that does not alter the real character of the suit which is to recover arrears of rent, and that therefore the provisions of s. 29, Beng. Act VIII of 1869, apply to the case. That being so, even allowing plaintiffs the space of nine months and ten days during which their previous suit was pending, it seems that all claim for rent beyond three years is out of time. This case is clearly distinguishable from the case of *Prosonno Coomar Paul Chowdhry v. Mudden Mohan Paul Chowdhry* (1). There it was held that the subject of the plaintiffs' claim was not rent, it being sought to enforce certain liabilities arising out of equities as against parties who were not the ostensible tenants. I think the judgment of the lower Court must be modified on this question. The plaintiffs will get a decree for only three years' rent. Each party will pay his own costs.

Before Mr. Justice Pontifex.

IN THE MATTER OF THE PETITION OF NOLITMOHAN DOSS, AN INSOLVENT.

11 & 12 Vict., c. 21 (*The Indian Insolvent Act*), s. 36.—Practice—
Examination—Counsel.

1873
August 12.

A person from whom property is sought to be taken under s. 36 of 11 & 12 Vict., c. 21 is entitled to be represented by Counsel.

ONE HURRUCK CHAND GOLICHA, a creditor of Nolitmohan Doss, an insolvent, on the 5th August 1873, applied for an order directing that an early day might

(1) *Ante*, p. 31.

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be fixed for the attendance and examination of the insolvent, and of Chundermoney Raur, and Shamlall Doss, under s. 36 of the Insolvent Act.

IN THE
MATTER OF
THE PETITION
OF NOLIT-
MOHAN DOSS.

The applicant in his petition stated (*inter alia*) that the insolvent had other moveable property than that which had been set out in his estate-paper, and had not given up possession thereof to the Official Assignee for the benefit of his creditors, but had concealed a portion of the same in his own house, a portion in the house of Chundermoney Raur, of Goopsemoban Bosa's lane, and another portion in the house of Shamlall Doss, of Suambhoenath Doss's lane; that the insolvent had given up a portion of his *khatta* books and books of account, but had not as yet given possession of all of them, although he had been called upon for them by the Official Assignee. An order was made as prayed, and the matter now came on for hearing.

Mr. Allen, on behalf of Hurruck Chand Golicha, objected to Mr. Phillips' appearing for Chundermoney Raur and Shamlall Doss, and in support of his contention referred to *In re Mohendrolall Doss*, 30th July 1870, mentioned in the notes to s. 36 of the Insolvent Act; see Millet & Clarke's *Insolvency in India*, p. 51.

Mr. Phillips submitted that in the case of *In re Mohendrolall Doss*, it did not appear that the person who was to be examined had any interest at stake, whereas in the present case it was alleged that property was in the possession of his clients, and that endeavours were about to be made to take such property from them.

PONTIFEX, J.—The proceedings under s. 36 are peculiar. If in any case other than under the Insolvency Act Mr. Allen's client wanted to recover the property which he alleges is in the possession of the persons whom he has cited as witnesses, he would have to sue them for it as defendants.

I consider that, as a matter of fairness, a person from whom property is sought to be taken under s. 36, is entitled to be represented by Counsel.

Attorney for Hurruck Chand Golicha: Baboo W. C. Bonnerjee.

Attorneys for Chundermoney Raur and Shamlal Doss: Messrs. Trotman & Co.

Before Mr. Justice Pontifex.

1873

August 5.

IN THE MATTER OF HAMILTON ANSTRUTHER AND ANOTHER,
INSOLVENTS.

Schedule, Verification of, by Affidavit—Absence of Insolvent—11 & 12 Vict., c. 21 (Indian Insolvent Act).

HAMILTON ANSTRUTHER and William Mactavish, the insolvents in this matter, applied to the Court for their personal discharge. A similar application had been made on the 5th April 1873, and on that occasion the trustee, under the

English bankruptcy of one James Hamilton Robinson, appeared, and it was ordered that the further hearing of the matter should stand adjourned until the 5th of August with *ad interim* protection; that the insolvents be at liberty to amend their schedule, and that the substance of the order be published twice in the *London Gazette*, and once in the *Calcutta Gazette*. At this hearing Mr. Anstruther had been examined. It now appeared that, subsequent to this order Mr. Anstruther was obliged to leave India on account of ill health, and was on his way to the south of Italy, consequently he was not in Court to verify the schedule. No opposition had been entered and Mr. Mactavish was present in Court.

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IN THE
MATTER OF
HAMILTON
ANSTRUTHER.

Mr. Woodroffe and Mr. W. Jackson for the insolvents.

Mr. Woodroffe contended that there was nothing in the Act which declares that the insolvent must personally attest the truth of the schedule; that in this case one partner was in Court, and that his attestation would be sufficient; but that, if necessary, a commission could issue, and Mr. Anstruther be examined.

Mr. Remfry, for the trustee, under the English bankruptcy of J. H. Robinson, asked for his costs.

PONTIFEX, J.—Under the circumstances of this case, there being no opposition, and no one desiring to question Mr. Anstruther, who has already been examined once, and has lately been sent away from India dangerously ill I consider that it will be sufficient that the truth of the schedule should be attested by the other insolvent, Mr. Mactavish, who was the partner of Mr. Anstruther; but perhaps it would be as well to have on the record of the case an affidavit from Mr. Anstruther sworn before a notary public, or a British consul, verifying the schedule. Personal discharge is given upon the understanding that such affidavit, will be filed.

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Aug. 18 & 27.

Attorney for the insolvents: Mr. J. O. Moses.

Attorneys for the trustee under the English bankruptcy of Mr. Robinson Messrs. Rogers and Remfry.

Before Mr. Justice Macpherson.

KISTOKAMINY DOSSEE v. MIRTOONJOY DUTT.

Costs—Hindu Widow—Partition Suit.

In a suit by a childless Hindu widow for partition of her late husband's estate from which she alleged that she had been ejected by the defendant, the reversionary heir, the widow consented to a decree for partition, whereby a moiety of the property was allotted to her for the estate of a Hindu widow, and the parties were ordered to pay their own costs respectively. There was nothing in the decree to show that the defendant had been guilty of any misconduct, or that there was any neces-

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v.
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DUTT.

sity for the suit. An application by the widow that her costs of suit might be paid by the sale absolutely of the share allotted to her was refused.

THE plaintiff, a childless Hindu widow, having brought a suit for a partition of her late husband's estate against his reversionary heir the defendant, consented to a decree whereby she was declared entitled to a childless widow's interest in a moiety of the property, the defendant was declared entitled to the remaining moiety absolutely, and it was ordered that the parties respectively should bear their own costs of suit.

Mr. Bonnerjee, on behalf of the plaintiff, now moved for an order enabling her to sell her share of the property for the purpose of paying her costs of the suit and of the present application, and of securing her maintenance.

The motion was based on an affidavit, in which the plaintiff stated that about Rs. 1,200 was due to her attorneys for costs; that she was possessed of no property besides that allotted to her in the suit, the value of which did not exceed Rs. 2,000; that unless she could make arrangements to pay the costs due to her attorneys, proceedings would be taken against her which would render her liable to further costs; that she had attempted to sell her share, but that the defendant had warned off intending purchasers; and finally that she had been compelled to bring the suit, in consequence of her having been turned out of the house, which was the subject of partition, by the defendant,

Mr. Bonnerjee cited *Cox v. Cox* (1). and 1 Seton on Decrees (3rd edit.) page 578.

Mr. Wood, *Contra*.

MACPHERSON, J — I cannot grant this application. The applicant has consented to a decree for partition which directs that the parties should bear their own costs respectively. There is nothing in the decree to show any misconduct on the part of the defendant, or that there was any necessity for the suit at all. The partition has been effected, and the widow now asks that her costs should be paid out of the share allotted to her *i.e.*, not out of the life-interest to which alone she is entitled, but by sale absolutely of what has been allotted to her. As the defendant is the immediate reversioner who, on the plaintiff's death, will succeed to this property as heir of her husband, the plaintiff in effect asks that the defendant should ultimately bear her costs of this suit. If she had any case against the defendant which made it proper that her costs should be thrown on him, she ought to have had the question raised and decided before the decree was passed. It is not in every suit by a childless Hindu widow for partition that it can be taken that the suit is for the benefit of her deceased husband. Partition in itself is in no degree a necessity or a benefit to the deceased husband. And if the widow wishes to pay the costs of a partition suit which she has brought, by sale of the property allotted to her

(1) 3 K. & J., 554.

and not merely by sale of her own limited interest therein, she must make out a distinct case of necessity, and must prove that she was driven to sue in order to protect herself and her husband's estate.

Attorney for the plaintiff: *Baboo Kallynath Mitter.*

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Attorneys for the defendant: *Messrs. Rogers and Remfry.*

Before Mr. Justice Markby and Mr. Justice Birch.

RAMNIDHY KOONDOO AND ANOTHER (JUDGMENT-DEBTORS) v. RAJAH
OJODHYARAM KHAN (DECREE-HOLDER).*

1873
May 31.

Power of Mofussil Courts to make orders in poenam against Persons not Parties to a Suit—Order for Payment of Costs on Person not Party to the

Suit, and after Dismissal of Suit.

Baboos Kally Mohun Doss, Bamesh Chunder Mitter, and Bhubany Ohurn Dutt for the appellants.

The Advocate-General offg. (Mr. Paul), Mr. Woodroffe, and Mr. B. T. Allan for the respondent.

THE facts are stated in the judgment of the Court, which was delivered by

MARKBY, J.—In this case it has been established to the satisfaction of the District Judge, upon an inquiry instituted by him, that Ramnidhy Koondoo and Bykantnath Koondoo, being desirous of entering into a transaction for the purpose of assisting certain persons called the Bhooyas in establishing their claim to certain landed property in Midnapore, agreed that they should receive as a consideration for so doing the half of any property that might be recovered in the suit; and in order to carry out this arrangement, purchased from the Bhooyas at a nominal sum one-half of their interest in this property: but the Koondos, instead of taking a conveyance in their own names and joining with the Bhooyas as plaintiffs in the suit, took a conveyance in the name of one Shama Soondery, an indigent member of their family, and dependent upon them for support: and they caused the suit to be brought in her name and that of the Bhooyas jointly. The District Judge has found that Shama Soondery was thus put forward by the Koondos in order to save themselves from having to pay the costs of the suits which were to be brought to establish

* Miscellaneous Regular Appeals, Nos. 62 and 63 of 1873, from the orders of the Judge of Midnapore, dated the 14th February 1873.

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the claim in case they should be unsuccessful. The District Judge is further of opinion that Ramnidhy Koondoo and Bykantnath Koondoo are the real plaintiffs in the suit, though acting in the name of Shama Soondery. Upon these facts being established, the District Judge directed that the names of Ramnidhy Koondoo and Bykantnath Koondoo should be added to the decree for costs which the defendant had obtained in the two suits brought in the name of the Bhooyas and Shama Soondery Dossee under the above arrangement, and which the District Judge had dismissed. Having had the depositions taken by the Judge read to us, and having heard the arguments thereon, we have no reason whatever to doubt that his conclusions of fact are fully justified by the evidence.

The question for consideration is whether the District Judge had power to make such an order as was made by him upon these facts being brought to his notice.

Whether or no, if the application had been made whilst the suit was still pending in the District Judge's Court, the Koondos could have been made liable in the decree for costs, we need not now determine. No doubt, the District Judge had facts before him which showed that Shama Soondery's ownership was a mere fiction; that in fact, as put by Mr. Woodroffe, she was no more a reality than the John Doe or Richard Roe in the old-fashioned English action of ejectment, and possibly it might have been considered that, in making the Koondos by name liable for costs, he was in reality only drawing up the decree in accordance with the real facts of the case. But, however desirous we may be to support the District Judge in checking an undoubted fraud, we feel unable to say that he had power to make such an order in the present case, because when that order was made, the suit was no longer pending in his Court. The record had left his Court, and had been brought up to this Court upon appeal against the decree dismissing the suit. Even, therefore, if the District Judge had power to draw up a decree making the Koondos liable for costs whilst the suit was still pending in his Court, it was clearly impossible for him to do so, after it had been carried out of his Court into the Court of Appeal.

It was, however, contended that this was not really what the Judge intended to do; that this order should be looked upon not as a decree or as part of a decree against parties to a suit, but as an order made *in piam* against the Koondos, similar to the orders which have been sometimes made in the High Court on the original side against persons not parties to the suit to pay the costs of a suit which they have promoted or instigated. It is not necessary for us, on this occasion, to examine accurately upon what grounds such orders are made by this Court. The general principle cannot be denied that Courts of Justice have only power to deal with persons brought before them by regular process of law, and they have not power otherwise than by such process to summon before them any persons they may choose, to answer for their misconduct. There are, no doubt, exceptions to this principle.

such as the power to punish what is called "contempt of Court," and it has been considered that this Court on its original Side has very wide powers in this respect. But we do not feel justified in saying that the Civil Courts of the mofussil have these wide and general powers. If one such Court has them, all must have them; and we think it must not be too hastily assumed that Courts of such various grades have all precisely the same wide and general powers as are possessed by this Court. No authority has been produced before us for holding that mofussil Courts possess power to make an order *in pœnam* against persons who are not parties to a suit such as the Judge has made in this case, and no instance has been shown in which such powers have been exercised. Special powers to punish by fine not exceeding Rs. 200 any person guilty of contempt in open Court, or of undue arrogations of the authority of the Court, or of illegal execution of judicial authority in his own cause, were conferred upon these Courts at their foundation (Regulation IV of 1793, s. 21), and these powers have been since slightly extended by the Legislature. But no attempt was made to bring this case within any legislative provision.

It was also contended for the respondent that no appeal lies to this Court against such an order, or that if it lies at all, it can only be heard as part of the general appeal which has been preferred to this Court against the decision of the suit by the District Judge; but whether an appeal lies or no, the matter having been fully discussed, and the order complained of having been made in a suit of which the record is now in this Court, we have no doubt that we ought to set it aside; but we do not think we ought to allow any costs; for though Ramnidhy Koondoo and Bykantnath Koondoo have succeeded in setting the order aside, we cannot too strongly express our disapprobation of their conduct.

Before Sir B. Couch, Kt., Chief Justice.

IN THE GOODS OF BRINDABUN GHOSE, DECEASED.

*Court Fees Act (VII of 1870), Sch. I, art. 2—Financial Resolution, No. 2004
14th July 1871—Administration—Trust Property.*

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1873
March 13.

The following case was referred to the Chief Justice, under s. 5 of the Court Fees Act, 1870, by the taxing Officer:—

"Brindabun Ghose and Bistodoss Ghose were brothers, and were joint in estate. Brindabun Ghose had died unmarried, leaving no relative, except Bistodoss Ghose. Bistodoss Ghose has obtained an order for letters of administration of the property and credits of the deceased, consisting of a half share

"(1) of moneys in the Government Savings Bank, deposited in the name of the deceased;

"(2) of Government securities standing in the name of the deceased;

"(3) of a family dwelling-house and small outstanding dues.

See also
14 B.L.R. 186.

33 and 73

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"The other half share of the property above specified is claimed by Bistodoss Ghose as belonging to him.

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"The letters of administration will enable the administrator to deal with the whole of the moneys and Government securities deposited or standing in the name of the deceased, and not only of his half share,

"The question submitted for determination is

"Whether or not Bistodoss' half share is to be treated as trust property within the meaning of the Financial Resolution, No. 2004, dated 14th July 1871 (1), and exempted from the payment of the two *per centum ad valorem* fee prescribed by the Court Fees Act, 1870, Sch. I, art. 2?"

The judgment of the Court was delivered by

Couch, C. J.—Bistodoss' half share should be treated as trust property, and be exempted from the two *per centum ad valorem* fee.

Before Mr. Justice Phear and Mr. Justice Mitter.

1873
July. 1.

MONINDRO CHUNDER SIKHAR (PLAINTIFF) v. MONEERUDDEEN
BISWAS AND ANOTHER (DEFENDANTS).*

Landlord and Tenant—Sub-tenant—Excavation of Tank—Suit for Restoration of Land to original state or for damages.

THIS was a suit to compel the defendants to restore certain land, of which they were in possession, and on which they had excavated a tank, to its former state, or in lieu thereof to recover damages for the injury done to the land by the excavation.

Baboo *Amarindro Nath Chatterjee* for the appellant.

Baboo *Mohendro Lall Mitter* for the respondents.

*Special Appeal, No. 333 of 1873, from a decree of the Additional Judge of Jessore, dated the 23rd November 1872, reversing a decree of the Subordinate Judge of that district, dated the 21st December 1871.

(1) "In the exercise of the power vested in him by s. 35 of the Court Fees Act, 1870 the Governor-General is pleased to remit in the whole of British India the fees chargeable under Sch. I, art. 2 of the said Act in respect of probate of wills or letters of administration, in so far as such wills or letters of administration relate to property which a deceased person was possessed of or entitled to, not beneficially, but as a trustee for any other person or persons; . . . provided that this remission shall not extend to cases in which a trustee has the power of appointing or otherwise conferring a beneficial interest in the said property."

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MONINDRO
CHUNDER
SIRCAR

v.

MONEERUD-
DEEN BISWAS.

' The cases of *Nanda Kumar Banerjee v. Ishan Chandra Banerjee* (1) and *Gopeekishen Gossain v. Sheikh Dowlut Mean* (2) were cited in the course of the argument.

The judgment of the Court was delivered by

PHEAR, J.—In this case, which was heard by Mitter, J., and myself two days ago, it appears that the plaintiff let a certain piece of land to Modhoosoodun, one of the defendants. and, by the terms of the lease, it was, amongst other things, stipulated that the lessee should not excavate a tank on the land.

Modhoosoodun sublet the land, and in this way Jammeeruddeen and Moneeruddeen became the tenants actually in occupation of the soil. They, in the course of their occupation, excavated a considerable space of ground, and the plaintiff brought this suit against them as well as against Modhoosoodun, seeking to compel the defendants to restore the ground to its former condition, or in lieu thereof to obtain damages from them:

The first Court was of opinion that the acts of Jammeeruddeen and Moneeruddeen were in contravention of the terms of the lease. and granted the plaintiff the relief which he asked.

On appeal, however, the Judge was of opinion that Jammeeruddeen and Moneeruddeen, inasmuch as they were not parties to the original lease granted by the plaintiff to Modhoosoodun, were not liable in this suit. He said that the plaintiffs remedy, if any, was against his lessee. Accordingly he dismissed the plaintiff's suit as against Jammeeruddeen and Moneeruddeen.

The plaintiff appealed specially to this Court, making the two defendants, Jammeeruddeen and Moneeruddeen, respondents, and omitting Modhoosoodun. We have thus to treat the case as if it were originally a suit brought by the plaintiff against these two defendants alone.

It seems to us quite clear that the Judge has fallen into error. The defendants Jammeeruddeen and Moneeruddeen are not strangers trespassing upon the land, but have a right to be there, as they themselves maintain, under a lease which they have obtained from Modhoosoodun. They cannot be ejected from the land by the plaintiff. But, on the other hand, they can have no more right to use the land in contravention of the terms of the lease than their immediate lessor, Modhoosoodun, had. They are bound to know what were the terms upon which their immediate lessor had a right to hold the land. If he has concealed those terms from them to their detriment, it is possible that they may have a remedy against him. But it would be almost monstrous to hold that, because Modhoosoodun had given over possession of the land to a sub-tenant, therefore the plaintiff would be deprived of a direct remedy against the wrong-doer.

(1) 1 B. L. R., A. C., 91.

(2) 1 W. R., 156.

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It appears to us that, if the plaintiff makes out by evidence that the acts which he charges the defendants with having committed, are acts done in breach of the stipulation which he made with his lessee Modhoosoodun, he has a right to have the assistance of the Civil Court by way of injunction or otherwise for the purpose of getting the land restored as nearly as may be to its former condition. In other words, if the plaintiff's case is made out, the Civil Court has full jurisdiction to make the defendant level the land, or in default thereof to pay such money by way of damages to the plaintiff as will enable him to restore the land to its former condition without loss.

We, therefore, reverse the decision of the lower Appellate Court, and send back the case to that Court for re-trial upon its merits.

Costs will abide the event.

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—, s. 230—*Possession — Title — Limitation.*] The defendant purchased in 1856 from the Official Assignee certain property belonging to one D. In 1867 he brought a suit against the heirs of D for possession of the property purchased; he obtained a decree in May 1869, under which he obtained possession in May 1870. In June 1870 the plaintiff filed a petition under s. 230, Act VIII of 1859, alleging that he had purchased the property claimed from the heirs of D in 1864 and had been in possession until he was ousted by the defendant, and that he was not a party to the suit brought by the defendant in 1867. *Held*, that

the title of the defendant was barred, more than 12 years having elapsed from the date of his purchase; and that the plaintiff was entitled, on mere proof of *bona fide* possession and that he was not a party to the suit by the defendant in 1867, to put the defendant to proof of his own title, and, on the defendant's failing to prove his title, to be restored to possession.

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_____, ss. 47, 56, & 58— <i>Suit for Rent—Service of Summons on Defendant resident in another District—Irregularity—Benami—Act VIII of 1859, s. 119.</i> In a suit for rent under Act X of 1859, service of summons on a defendant, whose abode is in another district, by a peon from the Court of the Collector of the district in which the suit is brought, instead of through the Collector of the district in which the defendant resides, as required by s. 47 of the Act, is not such an irregularity as vitiates the whole proceedings and renders the decree, and a sale in execution thereof, void.		
Per JACKSON, J.—The words in s. 56, “upon proof that the summons or proclamation has been duly served according to the provisions of this Act,” refer to the mode in which a summons is to be served, and not to the agency by which it is to be served.		
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recovered to B; but A, contrary to the terms of the agreement without the consent of B, compromised his claim with C, and obtained possession. *Held*, the agreement did not operate as a transfer of the property to B; she could not sue to eject A.

Semle.—B's proper remedy was a suit for specific performance or for damages for breach of the contract, to support which it would have been necessary to allege performance of her part of the contract, or at least readiness and willingness to perform, but prevention by A.

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A fluctuating boundary between zillas does not necessarily affect the rights of landed riparian proprietors.	
An <i>ikrarnama</i> between two zamindars as to the mode of determining the boundaries of their estates, in the event of changes in the channel of a river, cannot bind persons claiming under one with whom the perpetual settlement was subsequently made as to the lands in his possession, he being a stranger to that <i>ikrarnama</i> .	
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COSTS.—Hindu Widow—Partition Suit.] In a suit by a childless Hindu widow for partition of her late husband's estate, from which she alleged that she had been ejected by the defendant the reversionary heir, the widow consented to a decree for partition, whereby a moiety of the property was allotted to her for the estate of a Hindu widow, and the parties were ordered to pay their own costs respectively. There was nothing in the decree to show that the defendant had been guilty of any misconduct, or that there was any necessity for the suit. An application by the widow that her costs of suit might be paid by the sale absolutely of the share allotted to her was refused.	
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—, SCH. 1, ART. 2—Financial Resolution No. 2004, 14th July 1871—Administration—Trust Property.] IN THE GOODS OF BRINDABUN GHOSE, DECEASED ...	App. 39
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—, s. 228—Magistrate—Summary Trial—Appeal.] If on appeal from a summary Trial under Chap. XVIII of the Criminal Procedure Code, the evidence before the Judge is not sufficient to reasonably satisfy him that the prisoner has been rightly convicted, he ought to acquit him.	
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A declaratory decree cannot be made, unless the plaintiff would be entitled to consequential relief if he asked for it. It is discretionary with a Court to grant a declaratory decree, and the Courts in India ought to be most careful in exercising such discretion.	
<i>A</i> , widow of a Hindu, sued <i>B</i> as father and guardian of <i>C</i> to have it declared that the deeds executed by <i>A</i> and <i>B</i> , one of giving <i>C</i> in adoption, the other of receiving him in adoption, were null and void, on the ground that they were agreements to give and take in adoption, and that <i>B</i> did not give his son according to agreement. <i>Held</i> (reversing the decision of the Courts below), that such suit was not maintainable.	
<i>Quære</i> .—Whether religious ceremonies are necessary to make an adoption valid among Sudras?	
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——— <i>Limitation—Payment—Act X of 1859—Enhancement.</i>]	
A declaratory decree may be made only where the declaration of right may be the foundation of relief to be got somewhere. Thus, a suit to establish a title to land, with a view to taking proceedings in the Collector's Court under Act X of 1859 to enhance the rent, is one in which a declaratory decree may be made.	
The Judicial Committee will not on light grounds interfere with the exercise by a High Court of its discretion in granting a declaratory decree, the suit being one in which a declaratory decree may be made.	
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ERROR IN—Power to amend Decree—Mistake—Appeal—Review.] <i>A</i> obtained a decree for costs in a suit brought by <i>B</i> against <i>A</i> , and the decree was confirmed on appeal to the High Court on 18th June 1869. On 13th December 1871, <i>A</i> applied for execution of the decree, but it was found that the decree omitted to specify from whom <i>A</i> was to obtain his costs, and it was held that no execution could be taken out under the decree. <i>A</i> therefore applied to the Judge who passed the original decree to amend the decree, and the decree was amended on 21st August 1872 by inserting <i>B</i> as the party who was to pay <i>A</i> 's costs. <i>A</i> then made a fresh application for execution, which was allowed. Held, that the Judge had power to amend the decree notwithstanding it had been appealed from and confirmed by the High Court, and such order was appealable.	
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— MORTGAGE—Unregistered Document—Evidence Act (I of 1872), s. 91—Registration Act (VIII of 1871), s. 17.]	The defendant deposited certain title-deeds with the plaintiff as security for the repayment of Rs. 1,200 lent him by the plaintiff at the time when the deposit was made. On the evening of the same day, the defendant, by way of further security, gave to the plaintiff a promissory note for the amount of the loan, and endorsed thereon the following memorandum:—"For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with," the plaintiff, "as a collateral security by way of equitable mortgage, title-deeds of my property," &c. Held, that the memorandum did not require registration.				
	The equitable mortgage was complete without the memorandum; the memorandum was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred.				
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— Judgment in Rem—Legitimacy.]	In case of disputed succession to a raj, A, one son of the Raja, deceased, was put into possession under Act XIX of 1841, and a suit brought against him on behalf of another infant son B, failed on proof of the legitimacy of A. A third son C now claimed to be entitled against A's son, on the ground that A was illegitimate, or was the offspring of an inferior marriage. Held, the decree in the former suit was not a bar to the further prosecution of this suit, nor would it have been, had the issues in the two suits been precisely the same.				
	Quere.—Does there exist in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize) any Court capable of giving a judgment in rem?				
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_____, <i>Limitation—Act XIV of 1859, s. 20</i>]	
An execution-sale was stayed by consent for two months. and the execution-suit was struck off the file. During such period the execution-creditor applied to the Court to restore his execution-suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the execution-creditor) had attached them; but it turned out that he had attached them in another suit. <i>Held</i> , the application being <i>bona fide</i> , the period of limitation began to run from the date of the disposal of the application by the Court.	
ROY DRUNPUT SINGH ROY BAHADOOR V. MUDHOMOTEE DABIA	23
_____, <i>Sale—Separate Suit—</i>	
<i>Act XXIII of 1861, s. 11.</i>] A sued for possession of certain lands to which he alleged he was entitled as wussee (executor) under a wusseentnamah (will), and which B had fraudulently, during the minority of himself and his brother, caused to be put up for sale under a decree, the execution of which was barred by lapse of time. B had become the purchaser at such sale. <i>Held</i> , that a suit would not lie for the purpose of having it determined that the execution of B's decree was barred.	
NOJABUT ALI CHOWDRY V. SHEIKH MOHA BUSSEEROOLAH CHOWDRY ...	42
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WHICH PASSED IT— <i>Sale of Estate partly within and partly without the Jurisdiction—Civil Procedure Code (Act VIII of 1869), ss 249, 284, 285, & 286—“Part of an Estate”—Certificate of Non-execution—Jurisdiction—Nominal Purchaser—Benami—Non-joiner.</i>] A money-decree was made by the Judge of the 24-Pergunnahs against a mortgagor who was possessed of property in the 24-Pergunnahs, and also of an estate called Kismut Kosdaha,	

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18 mouzahs of which lay in Zillah 24-Pergunnahs, and 42 mouzahs in Zillah Nuddea. The whole estate was entered in the <i>taujih</i> of, and the Government revenue was payable in, the Collectorate of Nuddea. The Judge of the 24-Pergunnahs, without selling the property of the judgment-debtor which was within his jurisdiction, transmitted a certificate, under s. 285 of the Civil Procedure Code, to the Judge of Nuddea, stating that no portion of the amount of the decree had been realized by the Court of the 24-Pergunnahs. Thereupon, Kismut Kosdaha was attached and sold by order of the Nuddea Court. In a suit brought against the purchaser for possession of the 18 mouzahs lying in the 24-Pergunnahs by a person who claimed to have bought the right, title, and interest of the judgment-debtor in those mouzahs, but who in fact, was not the real purchaser:	
<i>Held</i> , that the suit ought to have been dismissed, because of the non-joinder as plaintiff of the real purchaser.	
<i>Held</i> further, that "part of an estate" in s. 249, Act VIII of 1859, means an aliquot part of an estate.	
<i>Held</i> also that, although the Court of the 24-Pergunnahs strictly ought not to have granted the certificate until the property in the 24-Pergunnahs had been sold, the error in so doing did not make the certificate void, or avoid the proceeding in the Nuddea Court, Kismut Kosdaha being substantially in the Nuddea District. <i>The Maharajah of Burdwan v. Sreenarain Mitter</i> commented on.	
KALLY PROSONO BOSE v. DINONATH MULLICK	56
EXECUTION OF DECREE — <i>Revenue-sale set aside—Refund of Purchase-money.</i>] In execution of a decree, <i>A</i> , the decree-holder, caused the right, title, and interest of <i>B</i> , the judgment-debtor, in certain surplus proceeds of revenue-sale then in the hands of the Collector to be sold, and <i>C</i> became the purchaser thereof. On confirmation of the judicial sale, <i>A</i> took out from the Court a portion of the amount paid by <i>C</i> in satisfaction of his decree. The balance was taken out by other decree-holders in satisfaction of their decrees against <i>B</i> . <i>B</i> . instituted a suit for, and obtained a decree, setting aside the revenue-sale. <i>C</i> applied to the Collector for payment to him of the surplus proceeds of the revenue-sale, but was refused on the ground that the sale had been set aside. In a suit brought by <i>C</i> against <i>A</i> and <i>B</i> for recovery of the amount paid by him for the purchase of the surplus proceeds of the revenue-sale:	
<i>Held</i> , that <i>B</i> was liable to refund the amount and interest.	
<i>Soudaminee Chowdhrain v. Krishna Kishore Poddar</i> distinguished.	
BISSESSUR LALL SAHOO v. RAMTUL SINGH	121
<i>Variation—Order made by Consent.</i>] The High Court, on appeal from a judgment of the Recorder of Rangoon, directed that an account should be taken between the parties, and that in default of payment of the amount thereby found to be due from the defendant to the plaintiff within three months, a sale of the mortgaged property should be effected. On the 18th March 1872 an order was passed by the Recorder of Rangoon, which was as follows:—"By consent the property subject to the equitable mortgage to be given up to the plaintiff in satisfaction of all claims and demands against the defendant under the decree of the High Court." On the 3rd July 1872 the Recorder directed the defendant to execute within six days a conveyance of the mortgaged property to the plaintiff. On the 11th July 1872 the Recorder declared that, if the conveyance was not	

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executed within twenty-four hours by the defendant, the Court would execute it, and accordingly on the 12th July 1872, the Court executed the conveyance. *Held*, that the recorder had no power to pass the order of the 18th March 1872, and that the defendant could not be required to execute the conveyance.

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GHATWAL—*Resumption—Hereditary Tenure—Purchaser at Auction-sale.*] A purchaser at an auction-sale cannot, where lands are held under an hereditary ghatwali tenure originally created before the decennial settlement and at a fixed rent, resume those lands on the suggestion that the ghatwali services are longer required.

The omission of word of inheritance does not show conclusively that a sanad is not hereditary: it being shown that a ghatwali tenure had descended from father to son, it was held that it was an hereditary tenure.

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IN THE MATTER MOONSHEE SYUD ABDUL KADIR KHAN v. THE MAGISTRATE OF PURNEAH ... App. 8

HINDU LAW—Adoption—Inheritance—Practice—Case on the Pleadings.] A second adoption cannot take place in the lifetime of the first adopted son

Where the son of the son first adopted sued as heir of the second adopted son to obtain the property left by him, and the suit throughout was contested with respect to his claim as heir of that second adopted son: *Held* the plaintiff could not, on appeal, shift his ground and regard the second adopted son as a trespasser, and seek to recover the property on the ground of its having belonged to the ancestor.

GOPEE LOLL v. MUSSAMUT SREE CHUNDRAOLEE BUHOONEE ... 391

————— *Nattore Raj—Stridhan—Endowed Lands—Sheba—Presumption—Mode of Dealing with Evidence—Weight of Evidence.]* In a suit as to the validity of the adoption of a claimant [to the Nattore raj, *held*, notwithstanding a finding of the Judge of first instance that the adoption was not proved, that the evidence fully supported the adoption.

The presumption is that the object of an endowment by a Hindu for the worship of idols is to preserve the *sheba* in the family, rather than to confer a benefit on an individual; but if there are in the deed of gift no words denoting an intention of the donor that the gift should belong to the family, that presumption will not arise.

RAJAH HUNDERNATH ROY v. KOOAR GOBINDNATH ROY.

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————— *Alienation—Sradh—Limitation.]*

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————— *Alienation by Hindu Widow—Legal Necessity—Performance of Husband's Sradh at Gya.]* The performance by a widow of her husband's *sradh* at Gya is a reasonable necessity for which she may alienate at least a portion of his estate.

MOHAMED USHRUF v. BROJESUREE DOSSEE. ... 118

————— *Impartible Raj—Mitakshara Law—Alienation by Father—Consent of Son.]* Where, in a part of the country the general law of which is the Mitakshara, a custom exists with regard to ancestral immoveable property, that it is not partible among the members of the joint family, but descends from the father to his eldest son, the father cannot alienate such property without the concurrence of his son, unless such alienation is justified by family necessity.

RAJAH RAM NARAIN SING v. PERTUM SING ... 397

————— *Inheritance—Mother—Stridhan.]* According to the Hindu Law as current in Bengal the mother succeeds to the property of her daughter bequeathed to her by her father before her marriage in preference to her husband. Such property falls within the category of *stridhan*.

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Joint Family—Separate Acquisition—Presumption—Burden of Proof.]	
The plaintiffs sued to have their rights declared under a mokurari maurasi lease obtained by <i>I</i> father of the defendant, but it was said with joint funds and for the joint family, which consisted of <i>I</i> and his two brothers, fathers of the plaintiffs. The defence was that the lease was granted to <i>I</i> after the dissolution of commensality. The existence of any nucleus of joint property was not proved. <i>Held</i> that, where one member of a joint family is found to be in possession of any property, the presumption is, not that he was in possession of it as separate acquired by him, but as a member of a joint family. Therefore the burden of proof was on the defendant to show that <i>I</i> had acquired the property separately, and that it was property which could by law be treated as a separate acquisition.	
TARUCK CHUNDER PODDAR v. JODESHUR CHUNDER KOONDOO...	193
Marriage—Public Policy—Void Contract—Assam.]	
A contract entered into by Hindus living in assam by which it is agreed that, upon the happening of a certain event, marriage is to be <i>came</i> null and void, is contrary to the policy of the law, and a suit cannot be maintained upon it.	
SITARAM v. MUSSAMUT AHEEREE HEERAHNEE ...	129
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Widow's Power to alienate her Husband's Property—Pilgrimage to Gya—Sradh—Necessity—Spiritual Purposes.]	
Expenses incurred by a Hindu widow for a pilgrimage to Gya and for the performance of <i>sradh</i> are legitimate expenses for which she can alienate her husband's property.	
Where the amount expended was Rs. 1,700, and the property was sold for Rs. 4,000, <i>held</i> in a suit by the heir against the purchaser to have the sale set aside, that the plaintiff not having offered to repay Rs. 1,700 and interest, his suit must be dismissed.	
MUTTERAM KOWAR v. GOPAUL SAHOO. ...	416
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ESTATE OF, AS HEIRESS OF HERSON—	
<i>Suit for Partition—Consent. decrees—Family Arrangement—Estate given to be held in severalty absolutely—Bengali of Sale.]</i>	
<i>M</i> , a member of a joint Hindu family, died, leaving three sons, <i>K</i> , <i>G</i> , and <i>D</i> , and a widow, <i>B</i> , who was mother of <i>G</i> and <i>D</i> . <i>G</i> having died, <i>B</i> , claiming as mother and heiress of <i>G</i> , joined with <i>D</i> in bringing a suit for partition against <i>K</i> and the other member of the joint family. The decree in the suit, which was made by consent of all parties, declared <i>B</i> and <i>D</i> entitled to two equal twelfth parts of the joint estate, and <i>K</i> to one-twelfth share,	

and referred it to certain persons as arbitrators, and not as commissioners only, to make the award. The arbitrators allotted certain land to *R* and *D* as their two-twelfth of the joint immoveable property, "to be held by them in severalty absolutely;" to *K* they allotted other land as his one-twelfth share; and in pursuance of an arrangement come to between *K* and *R* and *D*, they directed *K* to sell and convey his one-twelfth share to *R* and *D*, on receiving from them the sum as which it was valued. *R* and *D* paid the money, and *K* conveyed his share to them by a Bengali bill of sale, in which, after stating that he conveyed it in accordance with the award, he added:—"Becoming from this day invested with my rights, you have become proprietors of the right of gift and sale. I have no further connexion with the said land. Paying the taxes, revenue, &c., to Government, and causing mutation of name, you will continue, with your sons and grandsons succession to enjoin possessions in perfect peace."

In a suit brought by *K* against the executor of *R*, to recover a moiety of the property awarded to her and *D*, and of the property conveyed to them by the bill of sale, upon an allegation that *R* took this property only as mother and heiress of *G*, and that, upon her, death, it devolved upon him as *G*'s next of kin:

Held (reversing the decision of Macpherson, *J.*), that *R* took an absolute estate, and not merely a life-interest, both, in the property awarded to her and in the property conveyed by the bill of sale.

BOLYE CHUND DUTT v. KHETTERPAUL BYSACK	...	...	459
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ILLEGITIMACY — *Letters of Administration — Administrator-General — Act XXIV of 1867 (The Administrator-General's Act), s. 15.]*

JOSHUA STEPHEN DEMELLO v. L. P. D. BROUGHTON App. 6

Right to Bastard's Estate — Escheat — Non-assertion of Claim by Crown — Possession — Limitation — Estoppel — Tenant-at-will — Wife's Equity to a Settlement — Account — Receiver.] *M*, the widow and administratrix of a bastard, who had died intestate and without issue, received a letter in 1841 from the Lords Commissioners of the treasury stating that they did not deem it expedient to take any steps for the assertion of the rights of the Brown with regard to her late husbands' estate. Previous to this *M* had obtained possession of that estate, and two months before the receipt of the letter, she had contracted a second marriage. No settlement was made upon this marriage, and since the time of the marriage, *M*'s second husband had had the exclusive management of the property. In execution of a decree against the husband, his right, title, and interest in and to a portion of the property were put up for sale, and purchased by the plaintiff. The plaintiff's right to possession was disputed by *M*, who contended that her husband took no interest in the two-thirds of the property which went to the Crown which could be attached and sold in execution. In a suit by the plaintiff to establish her rights over the property:

Held, that the Crown would be estopped by the line adopted by the Commissioners of the Treasury in 1841 from asserting its claim to the two-thirds; that *M* had a good title to the whole estate

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even as against the Crown ; and that the rights of her husband extended over the whole estate and were rights which could be seized in execution and sold.

Held further, that M's husband being without property and in great difficulties, and subsisting only on a life-pension of Rs. 118 a month, M was entitled to a settlement.

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, s. 5— <i>Jurisdiction—Insolvent Trader—“Reside”—Costs of Opposition.</i>] The word “reside” in s. 5 of the Insolvent Act, when applicable to the insolvency of traders, includes an occupation for the purpose of trading, whether or not accompanied by sleeping or dwelling.		
In re HOWARD BROTHERS	...	254
, s. 36— <i>Practice—Examination—Counsel.</i>] A person from whom property is sought to be taken under s. 36 of 11 & 12 Vict., c. 21, is entitled to be represented by Counsel		
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Liquidated Damages.] The defendant executed a bond in favor of the plaintiff, by which he agreed to pay “interest at 8 annas per cent., month after month, and to repay the principal money within the period of three years.” It was further stipulated in the bond that, “should I fail to pay the principal and interest as agreed upon, I shall pay interest at 4 per cent. per mensem from

the date of this bond to that of liquidation." The defendant made default in payment. <i>Held</i> , in a suit brought on the bond, that the stipulation in the bond for the payment of interest at 4 per cent. per mensem was in the nature of a penalty, and the plaintiff was only entitled to recover interest at a reasonable rate. In this case 1 per cent. per mensem was given.			
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LAND ACQUISITION ACT (X OF 1870), ss. 30, 35— <i>Appeal—Difference of Opinion between Judge and Assessors—Compensation—Evidence, taking down—Act VIII of 1859, s. 172.</i>]			
Under s. 30, Act X of 1870, an appeal lies from the decision of the Judge where he differs from the Assessors, whether the Assessors agree with one another or not.			
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MAHOMEDAN LAW— <i>Dower—Amount—Limitation—Regulation III of 1793, s. 14—Practice—Form of Decree—Costs—Act VIII of 1859, s. 98—Compromise.</i>	
Where dower is "prompt," limitation does not begin to run until the dower is demanded, or the marriage is dissolved by death or otherwise.	
The amount claimed, viz., Rs. 16,25,000, not having been disputed in the Court of original jurisdiction, was allowed.	

Quere.—Whether, in the case of a divorce, a cause of action accrues in respect of deferred dower before the repudiation has become irrevocable, or the dower has been demanded.

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MALICIOUS PROSECUTION—*Libel—Witnesses' Privilege—Evidence—Onus Probandi.*] Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false, they should be proceeded against by an indictment for perjury.

In an action for damages for a malicious prosecution, it is not sufficient to prove merely the dismissal of the charge. It must be proved that the prosecution was without reasonable and probable cause.

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MANDAMUS—*Matter concerning Revenue—License to sell Liquor—Jurisdiction of High Court—Act XI of 1849, s. 9—Beng. Act III of 1873, s. 1—21 Geo. III, c. 70, s. 8.*] Under Act XI of 1849, s. 9, as amended by Beng. Act III of 1873, s. 1, whenever a license is granted for the retail sale of intoxicating liquors, the Collector is authorized to demand "such fee, tax, or duty as may from time to time be fixed with the sanction of the Board of Revenue, or a fee, tax, or duty, adjusted or regulated in such manner, and in accordance with such rules as the Board of Revenue, may prescribe." The Board of Revenue having notified that liquor licenses for the year ending March 31 st, 1874, would be put up to public auction, certain licensed liquor vendors moved the High Court for a mandamus to compel the Board of Revenue to issue rules prescribing the fee payable for licenses. *Held*, that the matter wholly related to the revenue, and therefore, by 21 Geo. III, c. 70, s. 8, High Court had no jurisdiction.

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<i>Jurisdiction—Suit for Foreclosure—Portion of Property in Mofussil—Letters Patent, 1865, cl. 12—Reg. XVII of 1806.</i> Where a plaint prayed for foreclosure of a mortgage in the English form, of certain land, situated partly in Calcutta and partly in the mofussil, and for an account, <i>held</i> that leave to sue having been obtained under cl. 12 of the Letters Patent, the Court had power to make a decree with respect to the whole of the property. The Court in such a case has no power to follow the procedure prescribed by Reg. XVII of 1806, which relates to the foreclosure of property in the mofussil, but it is bound to see that the defendant is not, by reason of the suit being brought in the High Court deprived of any substantial advantage which he would have had if the suit had been instituted in the mofussil Court.	
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PENAL CODE (<i>Act XLV of 1860</i>), s. 149, & s. 300, <i>Except. 2—Unlawful Assembly—Common Object—Murder.</i>] One member of an unlawful assembly, whose common object was to eject certain persons from a piece of land, the title to which was disputed, fired at and killed one of such persons. <i>Held</i> by Couch, C. J., and JACKSON, PHEAR, and PONTIFEX, JJ. (AINSLIE, J., dissenting) that the act being sudden and unpremeditated, the other members of the assembly were not guilty of the offence of murder under s. 149 of the Penal Code, but of rioting armed with a deadly weapon under s. 148.	
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PLEADERS' FEES—Unprofessional Conduct—Commission to mooktears—Act XX of 1865.] <i>A</i> , a pleader, was engaged by <i>B</i> , who was acting on behalf of <i>C</i> , to defend certain persons charged with the offences of rioting and of having caused grievous hurt. Two of the accused persons were relatives of <i>C</i> . <i>A</i> agreed with <i>B</i> that if, all the accused were acquitted, his fee was to be Rs. 500; if the two, who were the relatives of <i>C</i> , were acquitted, then he was to receive Rs. 250; but in the event of none of the accused being acquitted, he was to receive only Rs. 40. Before the trial <i>B</i> paid <i>A</i> Rs. 475; this having come to the knowledge of <i>C</i> , he telegraphed, saying that the fee was exorbitant, and <i>A</i> , upon being remonstrated with, handed over Rs. 250 to a banker to be placed to his (<i>A</i> 's) credit. <i>A</i> alleged that, out of Rs. 225 which remained with him, he paid Rs. 140 to <i>B</i> as commission, and that Rs. 25 was paid to his mohnrir. <i>Held</i> that <i>A</i> was guilty of fraudulent and grossly improper conduct. He was suspended from practising for the period of one year.	
<i>Per</i> PONTIFEX, J.—If a mooktear, paid for his services by his employer, were to receive in addition, without the knowledge of his employer, a percentage or commission from the pleader, he would be answerable, not only in the Civil Court, but also in the Criminal Court, to a charge of obtaining money improperly from his employer.	
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appear within the time prescribed, the registering officer must "refuse to register," as in cases falling under the latter clauses of s. 35, and must record the reasons for his refusal.

The party desiring registration ought to apply to the Registrar before the period for registration has gone by, either to register or to refuse to register, so as to enable him, in case of refusal, to take further proceedings under s. 73. So soon as it appears that the prescribed time has gone by, and the executing parties have not appeared, the order of refusal should be made at once.

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<i>RES JUDICATA</i> —Decision by Deputy Collector—Evidence of Title—Act X of 1859, s 23 cl. 6—Jurisdiction of the Revenue Courts—Act VIII of 1859, s. 2.] A, a ryot, brought a suit in the Court of the Deputy Collector against B, his zemindar, for recovery of possession of a piece of land, on the ground that he was the holder of a <i>maurasi</i> potta, and that he had been illegally ejected by B. The Deputy Collector held that the <i>maurasi</i> potta was genuine, and that B had illegally ejected A. He passed a decree in favor of A, in execution of which A obtained possession of the land in dispute. In a suit brought by B, against the heirs of A, in the Civil Court, for recovery of possession of the said piece of land, on the ground that them <i>aurasi</i> potta was a spurious document, and that no <i>maurasi</i> potta had been granted to A.	
Held (JACKSON, J., doubting) that the decision of the Deputy Collector was not conclusive between the parties.	
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